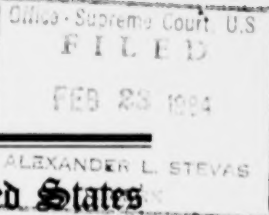


No. 83-491



In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND
ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED
SEPTEMBER 22, 1983
CERTIORARI GRANTED JANUARY 9, 1984**

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-491

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7673

D.C. No. I&NS# A22-452-208

PETITION FOR REVIEW

NORTHERN CALIF.

CONSOLIDATED: 80-7189

ADAN LOPEZ-MENDOZA, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
<i>1979</i>	
Dec 17	PAID DOCKET FEE. -vt-
Dec 17	FILED ORIG. & SIX COPIES OF A PETITION FOR REVIEW OF AN ORDER OF THE I&NS. -vt-
Dec 17	DOCKETED CAUSE & ENTERED APPEARANCE OF COUNSEL. -vt-
Dec 17	Notified counsel for the respondent issued copies. -vt-
<i>1980</i>	
Jan 16	FILED, AS OF 1/7/80, CERT ADMIN RECORD ON APPEAL IN ONE VOLUME. PLDGS, VOL. I, ORIG AND TWO COPIES. -tdp-
Jan 16	Petitioner's opening brief due 2/25/80. -tdp-
* * *	
May 23	Filed orig & 15 petitioner's opening briefs. (5/22/80) -ogm-
May 23	R'cvd 5 Excerpts (not necessary; records already here). -ogm-
* * *	
Oct 6	Filed orig & 15 Resp ans brief (9/22). -pf-
Oct 17	Filed orig & 15 Aptl's reply brief (10/15), per ogm as aple brief rec'd by aptl 10/2. -pf-
* * *	
<i>1981</i>	
Jan 12	ARGUED & SUBMITTED before: TANG, FLETCH- ER, CJ & WILLIAM G. EAST, DJ, OREGON. -pf-

Jan 30 Rec'd letter dated 4/27/81 from petitioner counsel re addl. citation. (panel) -dmf-

Feb 21 Filed in 80-7189, order (Browning, Wright, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, Tang, Skopil, Schroeder, Fletcher, Farris, Pregerson, Alarcon, Poole, Ferguson, Nelson, Canby, Boochever, Norris, Reinhardt) it is ordered that cases 80-7189 and 79-7673 shall be reheard by an en banc panel of the court. The previous three-judge panel assignments are hereby withdrawn. -dmf-

Mar 3 Filed order (Browning, Wright, Goodwin, Wallace, Hug, Tang, Fletcher, Poole, Canby, Norris, Reinhardt) cases 79-7673 and 80-7189 are hereby consolidated for purposes of rehearing before the above-listed en banc panel. -dmf-
as of 9/30/81 Filed order (BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, TANG, FLETCHER, POOLE, CANBY, NORRIS & REINHARDT) Oral argmrnt [sic] will be heard on Friday, December 18, 1981 at 1:30 p.m., in San Francisco, CA. -vt-

Dec 10 Filed resp add'l citations. (panel & active judges) -vt-

Dec 11 Filed petr's add'l citations. (panel & all active) -vt-

Dec 14 Rec'd, in 80-7189, letter dated 12/11/81 from resp. re: copies of cases previously cited to court (filed 12/10) for distribution to panel, to en banc panel. 12/11/81 -ck-

Dec 18 ARGUED AND SUBMITTED BEFORE: BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, FLETCHER, ALARCON, POOLE, CANBY, NORRIS, AND REINHARDT, CJJ. -lb-

1983

Apr 25 ORDERED OPINION FILED (NORRIS), GOODWIN CONCURRING, ALARCON, WRIGHT, WALLACE & POOLE DISSENTING & JUDG TO BE FILED AND ENTERED

Apr 25 FILED OPINION—REVERSED & REMANDED.

Apr 25 FILED & ENTERED JUDGMENT. -lm-

May 6 Filed motion and order for an extension of time for filing a petition for rehearing. Respondent shall file petition for rehearing by June 9, 1983. -jt-

May 6 Filed in 80-7189 petr (SANCHEZ) bill of costs (5/3) -ag-

May 12 Filed petr's (Lopez-Mendoza) bill of costs (5/9) -jt-

May 12 Rec'd letter from petr's (Lopez-Mendoza) counsel, re: incorrect caption on Court's decision. (panel) -jt-

* * *

June 15 MANDATE ISSUED w/costs.

* * *

Oct 5 Rec'd notice of filing of petition for certiorari from Supreme Court. bbm. 9-22-83 (panel & Lib.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7189

D.C. No. I&NS# A22-346-925

PETITION FOR REVIEW
FROM I&NS

WASHINGTON (Seattle)
CONSOLIDATED: 79-7673

ELIAS SANDOVAL SANCHEZ, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
1980	
Apr 14	PAID DOCKET FEE. -vt-
Apr 14	FILED ORIG & SIX COPIES OF A PETITION FOR REVIEW OF AN ORDER OF THE I&NS. -vt-
Apr 15	DOCKETED CAUSE & ENTERED APPEARANCE OF COUNSEL. -vt-
Apr 15	Notified counsel for the respondent issued copies. -vt-
May 15	FILED CERT ADMIN RECORD ON APPEAL IN ONE VOLUME. VOL. I, PLDGS, THREE CERT COPIES. -tdp-
May 15	Petitioner's opening brief due 6/24. -tdp-
May 16	Filed, as of May 15, petitioner's amended petition for review. 5/9 -dmf-
May 16	Issued copies of amended petition to respondents. -dmf-
Jun 26	Filed orig & 15 petitioner's opening briefs. (6/24/80) -ogm-
Jul 25	Filed orig & 15 respondent's briefs. (7/24) -ogm-
Dec 30	Rec'd, as of Dec 29, petitioner's addl. citations. (panel) -dmf-
Dec 30	Filed, as of Dec 29, petitioner's motion for submission without oral argument. (panel) 12/23 -dmf-

* * *

1981

Jan 8 SUBMITTED ON THE BRIEFS TO WRIGHT,
FARRIS, NORRIS, CJJ -pv-

- Jul 21 Filed order (Browning, Wright, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, Tang, Skopil, Schroeder, Fletcher, Farris, Pregerson, Alarcon, Poole, Ferguson, Nelson, Canby, Boochever, Norris, Reinhardt) it is ordered that cases 80-7189 and 79-7673 shall be reheard by an en banc panel of the court. The previous three-judge panel assignments are hereby withdrawn. -dmf-
- Jul 23 Filed in 79-7673, order (Browning, Wright, Goodwin, Wallace, Hug, Tang, Fletcher, Poole, Canby, Norris, Reinhardt) cases 79-7673 and 80-7189 are hereby consolidated for purposes of rehearing before the above-listed en banc panel. -dmf-
- Oct 1 as of 9/30/81 Filed order (BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, TNAG[sic], FLETCHER, POOLE, CANBY, NORRIS AND REINHARDT) Oral argument will be heard on Friday, December 18, 1981 at 1:30 p.m. in S.F. CA., -vt-
- Oct 15 Filed as of Oct 15, 1981 Order (BROWNING, WRIGHT, GOODWIN, HUG, WALLACE, FLETCHER, ALARCON, POOLE, CANBY, NORRIS, & REINHART [sic]) Judge Tang being unable to participate [sic] at the time designated for the en banc hearing, Judge Alarcon has been selected by lot to replace Judge Tang on the en banc court pursuant to rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. -ho-
- Dec 10 Filed resp add'l citations. (panel & active judges)
- Dec 14 Rec'd letter dated 12/11/81 from resp., re: copies of cases previously cited to court (filed 12/10) for distribution to panel, to en banc panel. 12/11/81 -ck-
- Dec 18 ARGUED AND SUBMITTED BEFORE: BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, FLETCHER, ALARCON, POOLE, CANBY, NORRIS AND REINHARDT, CJJ. -lb-
- [1983]
- Apr 25 ORDERED OPINION FILED (NORRIS), GOODWIN CONCURRING, ALARCON, WRIGHT, WALLACE & POOLE DISSENTING & JUDG TO BE FILED AND ENTERED.
- Apr 25 FILED OPINION—REVERSED & REMANDED.
- Apr 25 FILED & ENTERED JUDGMENT. -lm-
- May 6 Filed motion and order for an extension of time for filing a petition for rehearing. Respondent shall file petition for rehearing by June 9, 1983. -jt- Motion filed in 80-7189.
- May 6 Filed petr (SANCHEZ) bill of costs (5/3) -ag-

- May 12 Filed in 79-7673 petr's (Lopez-Mendoza) bill of costs 5/9
-jt-
- May 12 Rec'd in 79-7673, letter from petr's (Lopez-Mendoza)
counsel, re: incorrect caption on Court's decision. (pan-
el) -jt-

* * *

June 15 MANDATE ISSUED w/costs.

* * *

- Jul 22 Rec'd Supreme Court order granting (Solicitor General)
an ext. of time within which to file a petition for a writ
of certiorari to & incl. September 22, 1983. (Civatt) -lm-
- OCT 4 Rec'd copies of resp petition for certiorair [sic].

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7673

ADAN LOPEZ-MENDOZA, PETITIONER,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Petition for Review of a Order of the
Immigration and Naturalization Service

CERTIFIED ADMINISTRATIVE RECORD
A22 452 208

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

January 4, 1980

CERTIFICATION

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103 a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to File No. A22 452 208, Adan Lopez-Mendoza, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In compliance with 28 USC 2346 and 28 USC 2112, I further certify that the attached is the full, true, and correct administrative record, as required by 8 CFR 242.15, upon which the final deportation order is based.

DAVID N. ILCHERT
District Director
Immigration and Naturalization Service

Form G-24
(Rev. 5-1-73)N

**RECORD OF PROCEEDINGS, DEPORTATION
ADAN LOPEZ-MENDOZA**

Immigration and Naturalization Service
File A22 452 208

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630 Sansome Street

San Francisco, CA 9 1

In the Matter of

Adan LOPEZ-Mendoza

File

1. I hereby appeal to the Board of Immigration Appeals in the above entitled case.

2. Briefly, state reasons for this appeal.

(1) Respondent's deportation, seizure of evidence, is

(2) This case is distinguishable
Int. Dec. #2527 relied upon

3. I do (do) desire oral argument (do not)

Washington, D. C.

4. I am (am) filing a separate written brief or statement. (am not)

I hereby request a period of three weeks from today's date within which to file Respondent's brief herein.

January 3, 1978

Date

Individual Fee Register Receipt

UNIT STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

FEE PAID NUMBER

SFR 578 066971

APPLICANT

Adan Lopez-Mendoza

DATE

REMITTER - IF OTHER THAN APPLICANT

APPLICATION FORM NUMBER

(CIRCLE)

G-639	I-129 B	I-192	<u>I-240 A</u>	I-600	N-577
G-641	I-129 F	I-193	I-290 B	I-601	N-580
G-657	I-130	I-196	I-485	I-612	N-600
I-17	I-131	I-212	I-506	N-455	
I-90	I-140	I-246	I-559	N-455	
I-102	I-191	I-256A	I-570	N-595	

BANK
TRANSIT
NO

OTHER

TYPE OF
REMITTANCE
(CIRCLE)PC

BC

MO

IMO

G

ISSUING SECTION
(CIRCLE)INS

TC

M & F

OTHER (ABBV)

REC'D BY (INITIALS)

AMOUNT

\$ 50.00

SAMPLE - TOP RIGHT EDGE OF APPLICATION

GPO: 1977-246-710

Signature of Appellant (or attorney or representative)

DOUGLAS P. HAFFER

XXX (Print or type name)

693 Sutter Street, San Francisco 94102

Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

**MATTER OF
ADAN LOPEZ-MENDOZA
Respondent**

FILE A-22 452 208 - San Francisco

**IN DEPORTATION PROCEEDINGS
TRANSCRIPT OF HEARING**

Before: Monroe Kroll, Immigration Judge

Date: October 8, 1976

Place: 630 Sansome Street, San Francisco, California

Transcribed by Mary L. Moynihan

Recorded by Mary L. Moynihan

Official Interpreter Virginia Miranda

Language Spanish

APPEARANCES:

**For the Service:
Philip P. Leadbetter, Esq.
Trial Attorney
San Francisco, California**

**For the Respondent:
Douglas P. Haffer, Esq.
534 Pacific Avenue
San Francisco, California 94133**

**Form I-297
(Rev. 6-1-73)N**

pp. 1-102

THE IMMIGRATION JUDGE: This is a deportation proceeding against Adan Lopez-Mendoza, who will testify in the Spanish language through the official interpreter, Miss Virginia Miranda.

Is Adan Lopez-Mendoza present?

MR. HAFFER: Yes, he is, Your Honor. He's present.

THE IMMIGRATION JUDGE: Have him step forward, Mr. Haffer.

The record may show that Mr. Haffer, after indicating that Adan Lopez-Mendoza was present, asked a male individual to step forward and take the witness stand and that person is now seated on the witness stand.

Q Are you Adan Lopez-Mendoza?

A Yes.

THE IMMIGRATION JUDGE: Are you ready for the respondent, Mr. Haffer?

MR. HAFFER: Yes, Your Honor. We are ready to proceed.

THE IMMIGRATION JUDGE: Are you ready for the Service, Mr. Leadbetter?

MR. LEADBETTER: I am, Your Honor.

THE IMMIGRATION JUDGE:

Q Mr. Lopez-Mendoza, to be sworn, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A Yes.

THE IMMIGRATION JUDGE: You may be seated.

The —

MR. HAFFER: Your Honor, if I may at this time make a request prior to the entry of the Order to Show Cause in the record and prior to the respondent answering the charges in the Order to Show Cause. We would like to make a motion to terminate the proceedings at this time on the basis of lack of jurisdiction of this Court because of the illegal arrest of Mr. Lopez. I think it would be appropriate to take evidence on the issue of the arrest prior to taking any evidence on the merits of the matter since if the merits of the matter have been heard and are on the record the issue of the illegal arrest is moot, perhaps.

THE IMMIGRATION JUDGE: What do you claim was illegal about his arrest?

MR. HAFFER: We claim that the investigators of the Immigration Service entered onto private property without a warrant. They arrested Mr. Lopez without a warrant. And under the provisions of Section 287 of the Immigration and Nationality Act a warrant in most cases is required. In this case, specifically, a warrant was required. If I may, specifically, Your Honor, Section 287(a)(2) of the Act provides in part that the immigration officer shall have the power without warrant to arrest any alien in the United States if he has reason to believe the alien so arrested is in the United States in violation of any such law or regulation

THE IMMIGRATION JUDGE: I am familiar with that regulation.

MR. HAFFER: — and is likely to escape before a warrant can be obtained.

THE IMMIGRATION JUDGE: Having made that claim, you have the burden of establishing it.

MR. HAFFER: Yes, Your Honor, we do. We are ready to proceed, if we may, in establishing the fact that a warrant could and should have been obtained in this case and that the entry onto private property by the immigration officers was in violation of law and the arrest of the respondent was in violation of the law.

THE IMMIGRATION JUDGE: Proceed.

MR. HAFFER: We would first like to call the investigators. Are they ready to be called?

MR. LEADBETTER: They are.

MR. HAFFER: May we call Investigator Eddy.

THE IMMIGRATION JUDGE: What is his full name?

MR. HAFFER: I don't know what his first name is.

MR. LEADBETTER: I believe his first name is Robert J. Eddy.

THE IMMIGRATION JUDGE: Call him.

Step down, Mr. Lopez-Mendoza.

The record may show that the trial attorney left the courtroom and reentered with a male person.

Q What is your name?

A Robert C. Eddy.

Q To be sworn, Mr. Eddy, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A I do.

THE IMMIGRATION JUDGE: You may be seated.

You may proceed, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Eddy, did you participate in an arrest at Transco in San Mateo on August 3, 1976?

A Yes, I did.

Q And the address there was 511 East First Avenue in San Mateo?

A I believe it was.

Q Who accompanied you at that time?

A Criminal Investigator Robert Elder.

Q Do you remember what time of day you arrived at Transco?

A It was between 7:00 a.m. and 8:00 a.m. I can't be sure of the exact time.

Q Did you then arrest the respondent, Mr. Lopez-Mendoza?

A Yes, we did.

Q Do you recognize the man sitting next to me as the respondent that you arrested?

A I believe I do.

Q When you and Mr. Elder went to the premises of Transco, what information did you possess that there were immigration violations there?

A We possessed information indicating that there were seven illegal aliens employed by Transco in San Mateo.

Q Did you have the names of these seven —

A Yes, we did.

Q Did you determine prior to that time, or after or since that time the validity of this information?

A Well, there was at least one illegal alien employed there.

Q But, to your knowledge, were there any more than one?

A We haven't ascertained that.

Q Who supplied this information to you?

A An informant by the name of Gloria Gutierrez.

Q Did you receive information from Miss Gutierrez prior to this time?

A Not personally.

Q Had the Immigration Service received other information from Miss Gutierrez?

A I have no knowledge of that. Perhaps. I don't know.

Q Did you have any way of knowing at the time you received the information whether it was a reliable tip or not?

A I telephoned the informant prior to August 3rd, 1976, to discuss the information with her. She sounded reliable over the telephone. She sounded like she knew what she was talking about. She knew these individuals.

Q When did you first receive information from her that there were seven illegal aliens at Transco?

A I believe it was July 6, 1976.

Q Approximately when did you call her back to confirm or to discuss this matter with her further?

A August 2nd, 1976.

Q At what time of the day, if you recall?

A Sometime in the afternoon, probably three or four p.m.

Q Did you receive the original call from her on July 6th, 1976?

A No, I didn't.

Q Do you know who did?

A No, I don't.

Q How did you find out about this original contact by Miss Gutierrez?

A The information was written on a Form G-123 by a Service officer or a Service representative. I don't recall whom, and the informant gave her name and telephone number.

Q Do you know where this Form G-123 is now?

A It should be in the Service file.

Q When you arrived at Transco on the morning of August 3, 1976, did you enter the premises?

A Yes, we did.

Q How did you enter? Did you enter through a door?

A Through an opened door.

Q Were you aware at the time that Transco was a private company?

A Yes, I was aware of that.

Q Did you feel that it was — you didn't feel, then, that it was a public place?

A Well, the door, I should point out, was wide open, it wasn't just unlocked. It looked like a retail outlet of some kind. It looked like a type of establishment where somebody interested in purchasing something would enter through the same door we entered through.

Q Did it look like a retail establishment when you were outside or inside?

A Well, from the outside it looked like a transmission rebuilding shop or some kind of mechanical shop.

Q Now, the door you entered through, was it a regular door, was it a garage door, or what was it? Exactly what kind of door was it?

A It was a regular door.

Q It was wide open?

A Wide open.

Q Did you and Mr. Elder enter at the same time?

A Yes, we did.

Q After you entered, did you talk to somebody in the shop?

A Yes, we did.

Q Who did you talk to?

A Mr. Art Bradley.

Q How long after you entered the company did you talk to Mr. Bradley?

A We entered the door, through the door and stood by the door for two minutes, looked around for an interior office of some kind. We wanted to let somebody know we were in there. Mr. Bradley nodded to us when we walked in but he made no move to approach us at all. We stood there for approximately two minutes. Then I approached Mr. Bradley.

Q Prior to the time that you approached Mr. Bradley, as far as you know, he would have no way of knowing you

were from the Immigration and Naturalization Service. Is that correct?

A As far as I know.

Q You didn't yell out —

A No.

Q — "Immigration Service." or anything of that nature?

A No.

Q Two minutes after you entered you had approached Mr. Bradley?

A Yes, I did.

Q Where was Mr. Bradley at this time?

A He was engaged in his work in the shop.

Q How did you know that you were to approach Mr. Bradley?

A Mr. Bradley was the only one who nodded to us as we walked in.

Q How far away from you was he when he nodded to you?

A Approximately ten yards.

Q Did he signal anything to you, wave to come forward to him, or anything?

A No, he didn't.

Q So when you approached Mr. Bradley, what did you say to him?

A I identified myself. I presented my Service credentials. I advised him we had several names. I presented him with a piece of paper on which the names were written, the names provided by Gloria Gutierrez, and I advised him that we would like to interview these individuals.

Q Where was Mr. Elder at this time?

A He was standing by the door.

Q By the outside door?

A Inside the establishment, but by the door.

Q I assume to prevent people from running out through that door?

A That's correct.

Q After you identified yourself and stated to Mr. Bradley that you had several people that had been identi-

fied to you as illegal aliens, what did Mr. Bradley say to you?

A Mr. Bradley said something to the effect that he would not permit us to interview these individuals at that time.

Q Were you in possession of an arrest warrant?

A No, I was not.

Q Did Mr. Bradley ask you for some form of warrant or order?

A As I recall, he said that we would not interview his employees without a court order.

THE IMMIGRATION JUDGE:

Q Did he say you would not or you could not?

A I don't really recall.

Q You just testified that he had said you would not.

A He was emphatic. He said, "No, you will not interview my employees without a court order."

BY MR. HAFFER:

Q What happened after that?

A I advised Mr. Bradley that we would proceed with the interviews.

Q Did you indicate to Mr. Bradley that you had the authority to do so?

A No. I terminated the conversation at that point and walked away from him.

Q But you did continue with the interviews, is that correct, of the employees?

A Yes.

Q Mr. Elder through all of this time was standing by the door?

A As I walked away from Mr. Bradley, Mr. Elder proceeded further into the establishment and engaged himself in conversation with Mr. Bradley.

Q So Mr. Elder began to talk to Mr. Bradley?

A That's correct.

Q Was there any physical altercation between you and Mr. Bradley at this time?

A No.

Q Do you know if there was any physical altercation between Mr. Bradley and Mr. Elder?

A No, there wasn't.

Q Did you ever mention to or threaten Mr. Bradley with the possibility of arrest for interfering with your work?

A Yes, I did.

Q How, exactly, did you do that? What were your words, if you remember?

A Well, okay, I had already interviewed Mr. Lopez.

Q This was later, then?

A This was later.

Q Let's go in chronological order. After you left Mr. Bradley for the first time, then, and Mr. Elder came over and began conversing with Mr. Bradley, what did you do?

A I approached Mr. Lopez.

Q At that moment, what did you say to Mr. Lopez?

A I identified myself to him as an immigration officer and presented my credentials.

Q Did you identify yourself in the Spanish language?

A Yes, I did.

Q And you showed him your identification?

A No. Excuse me. Let me change that. I'm sure I probably first identified myself to him in the English language and when I received a look of — well, when he obviously did not understand what I said, I identified myself in the Spanish language.

Q After you identified yourself, what did you do? What did he say to you?

A Immediately after I identified myself, he didn't say anything.

Q Did you then take him into custody?

A No. I questioned him. I asked him his name, I asked him where he was from, how he entered the United States. I questioned him as to family ties, equities in the United States, made a determination that he did not have any immediate family here in the United States.

Q Was Mr. Lopez-Mendoza one of the people on the list of names given you by Gloria Gutierrez?

A No, he wasn't.

Q What made you think that he was in the United States illegally?

A There were seven names on the list. Mr. Haffer, provided by Gloria Gutierrez and there were no more than seven individuals in Transco that we could see.

Q So, your basis for thinking he was here illegally was the list that Gloria Gutierrez had given you?

A That's correct.

Q After this conversation when you determined that Mr. Lopez-Mendoza was here without family ties and papers, did you then take him into custody?

A I advised him he was under arrest.

Q At this time, then, did Mr. Bradley [become] involved once again in conversation with you?

A In a way, yes. I began escorting Mr. Lopez out of the building. We had to pass by Mr. Elder and Mr. Bradley, who were still engaged in conversation. I advised Mr. Bradley that his employee was under arrest. He said that we could not do that, that he would not let us arrest his employee.

Q At which point, did you then mention to him the possibility of arrest for interfering with you?

A Well, no, not at that time. Mr. Bradley put himself between Investigator Elder and I and the alien so the alien was backed up against some machinery in the plant, and Mr. Bradley was in front of him, would not move himself. I advised Mr. Bradley that if he did not move that we would consider that interference with the arrest, that I would arrest him also.

Q Were you aware of Mr. Bradley's immigration status?

A No, I was not.

Q You said before there were only seven people in the whole shop. Did you assume he was also an illegal alien?

A No, I didn't since he advised me that he was the owner of the shop. And he spoke English very well.

Q Did you question any other people in the shop besides Mr. Lopez?

A No, we didn't.

Q Why not, if you thought they were illegal aliens?

A We wanted to avoid an incident, Mr. Haffer.

Q Did you know whether or not Mr. Bradley sought the assistance of local law enforcement personnel?

A Yes, he did.

Q In what way, what form, do you know?

A He advised one of his employees to call the police. We agreed. We thought the police should be called in for assistance.

Q Both you and Mr. Elder agreed?

A We did not call the police, but we agreed with Mr. Bradley that perhaps a little assistance from the local law enforcement officials would be helpful for us.

Q Neither one of you shouted, "No, don't call the police"?

A No.

Q Now, you mentioned that Mr. Lopez-Mendoza was not on the list of the seven given to you by Miss Gutierrez. That's correct, is it?

A I'd like to correct one thing you said before. I didn't say that I counted the employees within the establishment and there were exactly seven employees in there. What I said was, there were no more than seven, perhaps, five or six. I don't know exactly how many were in there at the time, but no more than seven.

Q But you did testify previously that one reason why you questioned Mr. Lopez about his immigration status was because you had had a list of seven names of people who were supposedly working at Transco illegally, and because there were fewer than seven in the shop you assumed that he might, therefore, be an illegal alien.

A Exactly.

Q So, my question, obviously, related to Mr. Bradley, whether or not you had the same assumption, since there were seven or fewer in the shop, relating to him, and you answered, no, because you thought that he was the owner of the shop. I believe that was the answer you gave.

A Right.

Q You did testify before that Mr. Lopez-Mendoza's name was not on that list.

A That is correct.

Q When you approached Mr. Bradley for the first time, you did not mention Mr. Lopez's name?

A I didn't mention anyone's name. I simply showed him the list of individuals that had been provided to us by Gloria Gutierrez and advised him that I would like to question these individuals. We didn't get into names. He glanced at the list and confirmed whether or not any of those individuals were employed by his establishment.

Q Do you know whether Mr. Elder had mentioned Mr. Lopez's name before going in and talking to —

A Of course, I don't know that for a fact. Mr. Elder and I were not in contact at that moment. But I assume that he couldn't have mentioned Mr. Lopez's name since we did not know Mr. Lopez's name at that time.

Q Where was Mr. Lopez working in the establishment in relation to where you were at the time you were talking to Mr. Bradley?

A He was nearer the door. I passed Mr. Lopez when I approached Mr. Bradley.

Q Was he the closest person to you?

A Yes. Well, no, he wasn't.

Q But you went to him first?

A Right.

Q Did you have any reason for going to him first? How about the other people who were in the shop?

A I wanted to avoid Mr. Bradley. There were two individuals standing immediately adjacent or immediately next to Mr. Bradley. I didn't want to interview anybody in his presence where he could interfere with the interview. So I chose someone who was relatively isolated.

Q Do you recall a conversation you had with me on August 3, 1976?

A Yes, I do.

Q This was subsequent to the arrest of the respondent. Is that correct?

A Yes, I do.

Q This was on the eleventh floor of this building. Immigration Service, San Francisco?

A I believe so.

Q Do you recall making a statement at that time that Mr. Lopez's name had been given to you by an informer?

A No, I do not recall saying that.

Q All right. Generally speaking, Mr. Eddy, what are the powers of the Immigration and Naturalization Service investigator to arrest or make an entry onto private property without a warrant?

A The Service policy —

Q What are the powers, as far as you understand them, to make an arrest or to make an entry onto private property without a warrant?

A Well, as I understand it, if it's a public area we have the right to enter.

Q Without warrant?

A Without warrant.

Q What level of suspicion or belief do you have to have that there are undocumented or illegal aliens in that particular place? Or do you have to have any at all?

A To enter an establishment, in a public area of an establishment? I would say no cause whatsoever.

Q What do you consider to be a public area? I think we can eliminate such places as parks and places that are clearly owned by the public and operated for the public. But speaking of a private concern, what do you consider to be a public area?

A For example, if I entered a restaurant I would consider the kitchen area a private area, while the dining area is a public area.

Q If you entered a factory?

A It's hard to say. It's kind of difficult to say at this time. Any area that's public within a factory. Every factory is different.

Q Investigator Eddy, I have two photographs here and I am wondering if this, to your best recollection, is what the interior of Transco —

A Yes, Mr. Haffer. That looks like the interior of Transco.

Q Can you say that with certainty or does it appear to be similar to it?

A It appears to be similar to it.

Q But, in general —

A That's the general layout.

MR. HAFFER: I'd like to have those introduced in evidence, if I may. Your Honor.

THE IMMIGRATION JUDGE: In all fairness, Mr. Haffer, I think if you are introducing what appears to be the interior of a shop which Mr. Eddy thinks resembles Transco, you ought to offer a photograph of the entrance where the transactions described, thus far, took place.

MR. HAFFER: This is a photograph of the entrance there, Your Honor. Yes. There is the garage door and there is a door next to do [sic].

THE IMMIGRATION JUDGE: That's not a photograph of the entrance. The entrance is in the background.

MR. HAFFER: Do you mean from the outside?

THE IMMIGRATION JUDGE: You have questioned Mr. Eddy at some length about where he was in the shop, and I don't think from what you've said — what you have handed me doesn't portray where Mr. Eddy was in the shop.

MR. HAFFER: The purpose of submitting these photographs is not to establish where Mr. Eddy was or was not in the shop, but, rather, we are now questioning Mr. Eddy as to his definition of what is a public place where he can enter without probable cause.

THE IMMIGRATION JUDGE: From what I have heard so far, Mr. Eddy walked into a place with an opened door, apparently through which general customers entered. And you haven't given me photographs of anything resembling such a place. I'll ask Mr. Eddy.

Q Is this where you were in the shop, Mr. Eddy? Do either of these photographs show where you were?

A I can see where we entered the shop, yes, from this photograph here. Of course, the perspective is distorted. Different camera lenses are going to distort —

THE IMMIGRATION JUDGE: Don't you have a photograph of the entrance?

MR. HAFFER: No, I don't. I can ask one other question before you mark them for identification.

BY MR. HAFFER:

Q In this photograph, was this the area where the original discussion with Mr. Bradley took place, as far as you can recall?

A It could have been. I really don't recall.

MR. LEADBETTER: Your Honor, the Government is going to object to the entry because no foundation has been laid as to who took them or was, in fact, the premises, the date these photographs were taken, the same as the date of the arrest.

MR. HAFFER: We would like to have them for identification purposes. Mr. Bradley is testifying. He will be glad to provide all the necessary support that Mr. Leadbetter is seeking.

MR. LEADBETTER: If he took the pictures, Mr. Haffer? I think the person who took the pictures should be made to identify he went to the premises and these are the pictures he took.

MR. HAFFER: I assume —

MR. LEADBETTER: Put it this way. Under the circumstances, if Mr. Eddy was sure that, in fact, this was the area and/or — what, at least, I think you can do is identify as to when these were taken.

MR. HAFFER: We would be glad to do that with the owner of the store.

MR. LEADBETTER: I will reserve objection, then, Your Honor, at that time.

MR. HAFFER: You may object whenever you want to Mr. Leadbetter.

THE IMMIGRATION JUDGE: What are you asking now, Mr. Haffer? That these be entered in evidence or marked for identification?

MR. HAFFER: I think marked for identification now to help assuage any doubts Mr. Leadbetter may have as to their validity and when the owner of the company is testifying, we can go into some more detail as to when, how and by whom they were taken.

THE IMMIGRATION JUDGE: Are you challenging the investigator's right to have entered the establishment, to have come inside the opening, the large opening in the rear of one of the photographs?

MR. HAFFER: If I may, Your Honor, the large opening, I think Mr. Eddy testified to, was not opened. It was a small door, a regular door that was opened. That happens to be the garage door that's open there.

THE IMMIGRATION JUDGE: You don't have a photograph of the small area?

MR. HAFFER: No, unfortunately. He testified, however, that it was a regular door. We are trying to establish that, in fact, the fact the door was open to an establishment does not thereby make the inside of that establishment a public area. In fact, there was an office, which we'll be getting to when Mr. Bradley testifies. There's an office inside the garage area, inside the shop, and that this was not a public area in which an immigration officer can enter without any cause whatsoever, to believe that people are there, without it being a violation of law.

THE IMMIGRATION JUDGE: Is it claimed the investigators did not enter the office area?

MR. HAFFER: Yes. It is claimed they did not enter the office area. It is also claimed — Mr. Bradley will be claiming that he asked the officers to wait near the front door and that they entered, they came inside anyway.

WITNESS: That he told us to wait?

MR. HAFFER: That he signaled you to wait. Like that.

THE IMMIGRATION JUDGE: The photograph showing the large opening in the rear is marked *Respondent's Exhibit "A" for Identification*. The other one is marked *Respondent's Exhibit "B" for Identification*.

Proceed, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Eddy, you have testified that you consider it to be lawful to enter a public area without a warrant, with no cause whatsoever, if you believe there are illegal aliens there, as part of your job of arresting, or questioning, at least, people about their immigration status in the United States.

A We're talking about entering an establishment? It's not a question of —

Q Of entering an establishment. What do you consider to be the authority to arrest a suspected illegal immigrant.

or one suspected of violation of the immigration laws, without a warrant?

A Well, we determined that Mr. Loepz was an illegal alien, so it was no longer a question of suspect. We determined that Mr. Lopez was married, had a wife and child in Mexico at the time, he was unclear as to his address. It seemed to us he was likely to abscond. We felt that we were clearly within our authority to take him into custody.

Q Prior to seeing Mr. Lopez at that spot at Transco, you had no knowledge of his existence in the United States?

A That is correct.

Q You conducted your entire interview to find out about his status here, where his wife and child were, what his address was, inside Transco?

A That's correct.

Q And you, therefore, had reason to believe, you stated, he would abscond, escape, prior to obtaining a warrant?

A As far as we could determine, he had no close family ties.

Q Did you have a warrant for any of the seven people listed by Miss Gutierrez?

A No, Mr. Haffer, we didn't.

Q You received this information, you stated, on July 6th, 1976. Is that correct?

A Approximately.

Q Which was approximately a month prior to your visit to Transco.

A That is true.

Q Did you attempt to get a warrant for any of these people?

A No, we didn't. Clearly, there was not enough information given, there was not enough evidence to obtain a warrant.

Q There was not. What kind of evidence is needed to obtain a warrant for arrest?

A Facts.

Q What kind of facts, would you normally —

A Let me make it clear, Mr. Haffer. We did not go down there to arrest seven illegal aliens. We went to interview seven individuals and determine whether they were il-

legally in the United States. We had probable cause, we had names, information these individuals were illegally in the United States. We simply went down there to check out the information and ascertain its correctness.

Q What was the last word?

A Ascertain whether it was correct.

Q You didn't have probable cause for a warrant. Is that what you're saying, for any of these seven?

A We didn't have enough information. We didn't have ages, we didn't — all we had was names, and Gloria Gutierrez saying these individuals were illegally in the United States.

Q Now, on previous occasions you have applied to the District Director for warrants of arrest. Have you not?

A I have applied, yes.

Q How many times, approximately?

A Numerous times. I could not say.

Q Have you ever received a warrant of arrest, to issue one on someone?

A Yes, I have.

Q What sort of information was required for those?

A Information obtained through a direct interview with a Service officer indicating that the person is illegally in the United States, or documentary evidence, evidence indicating that a person entered the United States at a certain place, at a certain time, a passport, perhaps.

Q Was any of this kind of information given to you by Miss Gutierrez in her list of seven?

A No, it wasn't. That's why I say we went down there to interview the individuals and gather some facts.

Q Are warrants ever issued on the basis of tips from people who are not employees of the Service?

MR. LEADBETTER: I'm going to object to that. Your Honor. He's asking for something that I believe is beyond the scope or the authority of this particular investigator. He can testify as to his particular warrants. But I think it's beyond the scope of his authority —

THE IMMIGRATION JUDGE: So, Mr. Haffer, limit the question to as far as Mr. Eddy's knowledge.

BY MR. HAFFER:

Q As far as — to your knowledge and your experience

MR. LEADBETTER: I'm going to object again to that. He can ask as to his own personal knowledge about his warrants.

MR. HAFFER: That's what I said. "As far as you know from your experience."

MR. LEADBETTER: Will you rephrase —

THE IMMIGRATION JUDGE: You are not listening to Mr. Haffer, Mr. Leadbetter.

MR. HAFFER: I used the words "personal experience," Mr. Leadbetter.

MR. LEADBETTER: All right. If you'll rephrase it again, the Government will have no objection.

THE IMMIGRATION JUDGE: Go ahead, Mr. Haffer. Rephrase it again.

BY MR. HAFFER:

Q As far as you know of your personal knowledge and personal experience and your work as an investigator for the Immigration Service, have warrants been issued on the basis of information from informants as opposed to information from Immigration Service employees?

A Not in my experience. Not with just the receipt of a name.

Q What was the information you had from Miss Gutierrez?

A A name, seven names.

Q And nothing else?

A Nothing else.

Q Not where they came from?

A That they were from Mexico.

Q Also where they were working?

A That's correct.

Q No other information besides that? Just the name and where they were working?

A That's correct. Obviously, Gloria Gutierrez was not in a position to make a determination as to whether or not a person is illegally in the United States. She's not a Service officer. She is — you know, we make that determination, not the informant.

Q Do you know whether Gloria Gutierrez had any relationship with Transco?

A I have no idea.

Q One last series of questions I have here. You testified that Mr. Bradley tried to interfer[e] with — seemed to try to interfere with the arrest of the respondent. Is that correct?

A Yes. Mr. Bradley did interfere with our arrest of Mr. Lopez.

Q But you nonetheless arrested Mr. Lopez?

A That's correct.

Q You testified previously that you believed that immigration officers have the right to enter onto private property or private areas without a warrant, without probable cause. That's also correct, is it not?

A That is correct.

Q The situation where the owner of private property tells you that you cannot enter or that you cannot conduct your business there on private property, what is then your feeling as to your powers as an immigration officer?

A I cannot answer that in a yes or no format. I would have to explain the entire situation, Mr. Haffer.

Q Please do.

A Okay. The door was wide open. There were no "no trespassing" signs. I immediately assumed that an individual who wanted to have his transmission repaired would enter the same door we entered. We did not observe an office. There were no — we did not observe an office. Mr. Bradley acknowledged our presence. Perhaps he waved, perhaps he nodded. I can't recall at this time. When I approached Mr. Bradley and he advised us that he would not permit interviews, we were — the employees of the firm by that time knew we were immigration officers. There didn't seem to be any other alternative. It wasn't a question of our power and authority. We were inside at that time.

Q Well, I can understand that. But, obviously, when you entered, before you entered you knew that — potentially knew the reason you were there, I believe, was to investigate the existence of illegal aliens in that job. That's correct, is it not?

A That's correct.

Q Do you know if it is possible to obtain a warrant from the District Director of the Immigration Service to conduct entry onto private property?

A From the District Director?

Q Or from anybody.

A Yes, it is.

Q Who do you obtain the warrant from to do that?

A United States Attorney and the United States Magistrate.

Q Did you attempt to obtain a warrant from the United States Attorney or the United States Magistrate in this case?

A No. We didn't know there were illegal aliens down there. We had information there were and we went down to ascertain whether or not there were in fact illegal aliens.

Q You had specific information. I believe you said you had the names of seven people, the actual names of seven people given to you by an informant.

A Right.

Q You had called back the informant and indicated that you accepted or trusted her veracity or truthfulness in your second conversation you had with her. Is that correct?

A That's correct.

Q Did you think there was probable cause at that time to ask for a warrant to search or enter onto the private property in search of illegal aliens?

THE IMMIGRATION JUDGE: Do you mean before he went to the premises?

MR. HAFFER: Before he went to the premises.

WITNESS: We cased the place, so to speak on August 2nd. It looked like a public establishment. We did not feel we had enough information to obtain a search warrant to enter.

BY MR. HAFFER:

Q What sort of information would you need to obtain a search warrant to enter the premises? What sort of information above and beyond what you had here, that is, the names of seven alleged undocumented immigrants, specifically named, from a specific country, and a specific employment, locality? What else would you need?

A I'd like to have another source confirming Gloria Gutierrez's statements.

Q Did you ask Gloria Gutierrez for another source?

A No, I did not.

Q So what else? That's all else? The only additional information you need is another source?

A Before I make an affidavit, I would like to verify through other means just exactly who was working in the establishment, whether they were probably illegal aliens, either confirm the names.

Q How would you ever confirm the names without going there, creating a situation which you alleged existed here, that people would then be liable to escape?

A I've never personally applied for a search warrant, Mr. Haffer. I really don't know what it entails.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have anything of the witness, Mr. Leadbetter?

MR. LEADBETTER: Yes.

THE IMMIGRATION JUDGE: Before you proceed, Mr. Leadbetter, we will take the morning recess.

The hearing is resumed. You may proceed, Mr. Leadbetter.

MR. LEADBETTER: Thank you, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, you've testified that you went by the establishment, this transmission company, in San Mateo, on August the 2nd, 1976. Is that correct?

A That is correct.

Q When you went by, did you look into the business and what did you see?

A We cruised by the front of the establishment, the main street there I believe was Fifth Street, the large garage door was opened, which is one of these roll-up affairs, several feet wide. There were individuals milling around out in front, going back and forth between the interior and exterior of the enterprise.

Q Was there any sign over the door, the big door, identifying the business or anything?

A I don't know if it was directly over the big door, but there was a sign identifying the business as Transco.

Q You say side by side with the big door there's a smaller door?

A That is correct.

Q Did this smaller door just say "customers only," "keep out," or "do not enter"?

A Well — no, it doesn't. I don't know what it says on the front of the door, but I have to emphasize that both times we saw the door it was opened and the front of the door was not visible.

Q On the day in question, that'd be August 3rd, 1976, when you entered, do you remember, at the time you entered, did you look around for somebody to come forward to you when you first entered?

A Yes, I did. We both did.

Q Describe again what transpired thereafter.

A We walked in, looked around, everybody appeared to be dressed the same, everybody was apparently engaged in some kind of work on either machines or whatever. We looked for an interior office. We did not see one. Shortly after we entered, a man, who later identified himself as Art Bradley, acknowledged our presence by nodding or waving. I don't recall what the gesture was at this time.

Q Now, when Mr. Bradley first came up and you engaged in conversation, did you identify yourself to Mr. Bradley?

A Mr. Bradley never did come up to us. We waited for approximately two minutes after he acknowledged our presence. We assumed he expected us to walk over to him. So after milling around there, not knowing what to do, I decided to approach Mr. Bradley. We stood by the door waiting for him to come up to us. He never did come up to us. I approached Mr. Bradley and identified —

THE IMMIGRATION JUDGE:

Q What did you mean when you said, "after milling around"?

A We stood around in front of the door.

Q Is that what "milling" means to you?

A Well — okay. Yes. We were — you know, we didn't know what to do, we had our hands in our pockets, we were looking around, we couldn't take any action.

Q "Milling around" to me implies a lot of movement.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

WITNESS: We were not moving. We stood by the door.

THE IMMIGRATION JUDGE: That is what I thought you said the first time. That's why I asked you that. You used a word which has a different meaning from what you intended.

BY MR. LEADBETTER:

Q I want you to again state to the Court, to the best of your recollection, the exact conversation you had with Mr. Bradley, when you identified yourselves as immigration officers.

A Okay. I approached Mr. Bradley, I identified myself, presented my Service credentials, with a smile on my face and in a friendly manner I said, "My name is Robert Eddy, Investigator, with the United States Immigration and Naturalization Service. The man over by the door is James Robert Elder, Investigator, with the United States Immigration Service. We have this list of names provided to us by a confidential informant. We would like to interview these individuals and determine whether or not they are illegally in the United States." Mr. Bradley stated then and there that, no, we would not interview his employees at that time. He suggested that we come back at noon when they were eating lunch and interview them at that time. The gist was, he did not object to the interviews. He objected to us interviewing them on work time. I advised Mr. Bradley in a friendly manner that from past experience I knew that these individuals, if illegally in the country, would not be in the establishment at noon, that they — that if they were illegal aliens they would abscond, especially since the conversation was overheard by the individuals in the establishment. Mr. Bradley insisted that we do not interview his employees at that time. I insisted we would interview them at that time because they would not

be here if they were illegal aliens at noon. I terminated the conversation by simply walking away from Mr. Bradley.

Q Have you in the past conducted interviews in businesses similar to that as the transmission company, similar layout?

A Yes, I have.

Q What kind of business?

A Oh, I'm sure at one time or another I've been in another transmission shop somewhere. I can't recall immediately. But a foundry could be described as being similar to this type of layout.

Q At the time that you made your initial entry on the foundry premises on another occasion and a foreman or someone came up, what transpired?

A When — as a matter of courtesy, we always try to go to an officer or approach the foreman or somebody in charge, let them know what we're doing. Generally, I've never had a person object. I usually invite the foreman or somebody in charge to accompany us as we conduct the interviews in this type of situation. I've never been faced with an objection before.

Q Now, did Mr. Bradley at that time make any statements as to he would gladly cooperate with you at lunch time or he'd give you a list of his employees at lunch time or come back at lunch time?

A No, he didn't. He just suggested that we leave the premises immediately.

Q When you walked away from Mr. Bradley you walked over in the direction of the respondent. Is that true?

A That is correct.

Q When you approached him and first asked any questions in the interview, did you speak English or Spanish?

A Well, personally, when I approach somebody, no matter who they are, I identify myself in English and I give them my name in English, and if the person does not appear to comprehend what I'm saying, I repeat the question in Spanish, I repeat the statement in Spanish.

Q In this particular instance, after you repeated the initial in English and didn't get a response, did you start to speak Spanish?

A Could you repeat the question, please?

Q At the initial interview with the respondent, when he didn't answer your questions in English, did you then start to speak Spanish?

A Yes, I did.

Q Now, if he had ignored you totally and had just walked away from any of your interview, what would you have done?

A Well, I would not make any effort to persuade him to answer my questions. I would have to terminate the interview.

Q But this didn't occur?

A This did not occur. The respondent voluntarily answered my questions.

Q When you determined that in fact he was from Mexico, had no close family ties, you advised him that you were going to place him under arrest, did Mr. Bradley come over to you, or where was Mr. Bradley at this time?

A Mr. Bradley was engaged in conversation with Investigator Elder, as far as I could see. My back was to both of them. When I turned around, they were engaged in some kind of conversation.

Q Did you ask the respondent to come with you?

A Yes, I did.

Q Did he make a motion—did he start to move with you?

A Yes, he did.

Q Then what transpired?

A We walked by Mr. Bradley and Investigator Elder. Mr. Bradley engaged me in some kind of conversation, or I think James Robert Elder stated that — what I already knew, that Mr. Bradley would like us to leave the premises immediately. I said, "Okay, we're leaving the premises" — at that time we wanted to avoid an incident — "but Mr. Lopez is under arrest and he's going with us."

Q Where was Mr. Bradley? Was he in front of you or behind you?

A Okay. When I was talking — making my statement that Mr. Lopez was going with us, Mr. Bradley stepped be-

tween myself and the respondent and said that we weren't going to take his employee with us.

Q What was his stance as far as his physical stance at that time and standing in front of the alien?

A Well, when we first began this part of the conversation here, he was simply standing between myself and the respondent. I attempted to persuade Mr. Bradley to not cause any problems; we were going to leave the premises but that Mr. Lopez was going with us. Mr. Bradley said, absolutely not, that we weren't going to take him without, quote, a court order, unquote. Mr. Bradley — I advised Mr. Bradley that, well, we were going to take him whether he approved of it or not. He continued to object. He braced himself for a fight, stood there with his fists clenched. I likewise prepared myself for a confrontation.

Q Now, in your statements to Mr. Bradley about taking the alien, did you become emphatic?

A Yes. I became very emphatic. This all transpired over, I would say, two minutes, which was quite a lengthy period of time, you know, for this type of confrontation. We wanted to avoid an incident. We didn't want a fight. We didn't want any problems. We advised Mr. Bradley that we — if he continued to interfere, we would arrest him. I said, "Look —" I poked him on the chest with my finger. I said, "Look, Bradley, move. We're taking him out. We don't want to be involved in this. Neither one of us wants to be involved in a fight. Move."

Q Did Mr. Bradley move?

A No, he didn't.

Q Who took the alien out from behind Mr. Bradley?

A Okay. I say that — Mr. Bradley is kind of a stocky individual. I didn't particularly care to be involved in any kind of physical confrontation with him. So, when I realized he wasn't going to move, I said, "Okay —" Bob Elder, James Robert Elder was standing by my side. I said, "Okay, Bob, you go around behind him and drag out the alien," who was at that time refusing to come with us also. I said, "Drag him out from behind and I'll make sure that this guy doesn't clobber you in the meantime."

Q What did the alien state as to — in front of you, when Mr. Elder went to get him?

A The alien stated — it appeared to me he was kind of confused as to what to do here. We were telling him what to do and the boss was telling him what to do, and he said, no, and in sort of broken English, as I recall, "I'm going to stay here with my patron," which is "boss."

Q Now, did at any time you or Mr. Elder either draw your weapons or show your weapons?

A No, we did not.

Q Did you have handcuffs, if necessary, available?

A Yes, I did.

Q Now, Mr. Eddy, at the time the first notice came to your attention from a Gloria Gutierrez regarding the suspected aliens being in the United States and then ultimately your calling, did you have any further information come to your attention concerning this list of —

THE IMMIGRATION JUDGE: Mr. Leadbetter, you are just going over the same thing Mr. Haffer did. Is this what you call —

MR. LEADBETTER: This is important, Your Honor, as to, in effect, getting into the area of the search warrant.

THE IMMIGRATION JUDGE: Is it necessary to repeat the same questions Mr. Haffer asked and Mr. Eddy answered?

MR. LEADBETTER: No, Your Honor.

BY MR. LEADBETTER:

Q Did you know Gloria Gutierrez personally?

A No, I don't, Mr. Leadbetter.

Q Have you ever met her personally?

A No, I haven't.

Q The only conversation was on the telephone?

A That is correct.

Q Would you advise the Court as to what is necessary, to your knowledge and belief, to obtain a search warrant.

A Okay. To my knowledge and belief, we've all talked about search warrants, you know. It appeared that it would entail my going to, or entail my making an affidavit of some kind which I, you know, would outline my evidence or probable cause. I simply did not have enough information in this

case to go in and make out an affidavit. Obviously, because a person speaks Spanish doesn't mean he is illegally in the United States.

THE IMMIGRATION JUDGE:

Q Do you mean that you reached that conclusion after you had spoken to Lopez?

A What conclusion are you speaking of, Your Honor?

Q The one that you just said; Obviously, because he spoke Spanish doesn't mean —

A I said, in order for me to go out and swear to an affidavit, I want to be convinced myself. I'm not going to swear to something unless I personally am convinced of the —

Q Mr. Leadbetter was asking you about what you needed for a search warrant, not for a warrant of arrest.

A That's what we're talking about, I assume. To my belief, to my knowledge, I assume that I would have to execute an affidavit.

Q I would like to know why you didn't apply for a search warrant either before you went to the premises or after Mr. Bradley refused you access to them.?

A Well, the information, Your Honor, came from one Gloria Gutierrez. I have no idea who that individual is. I talked to her one time on the phone. She said that there were seven illegal aliens employed by Transco. That isn't enough information to convince me that I'm going to execute an affidavit that there are seven illegal aliens. I want to be convinced myself before I'm going to execute any kind of affidavit.

Q Is it correct, then, you thought you had better go there and investigate the matter?

A That is correct.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Now, Mr. Eddy, would you also have to have particular information before you swore to an affidavit on an arrest warrant?

A Yes, I would.

Q And based upon this information from Miss Gutierrez, did you feel you had sufficient information?

A No, I did not.

THE IMMIGRATION JUDGE:

Q I'm still puzzled. Did you think you had sufficient information to question people on the basis of questioning people?

A I felt that I had sufficient information to have cause enough to engage somebody in a casual conversation to ascertain certain facts.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Had you ever been at this transmission shop before, Mr. Eddy?

A As I said previously, I was there on August 2nd, 1976, but we did not enter the establishment.

Q I'm talking about either prior to August 2nd or 3rd. Had you ever made an arrest there?

A No, I had not.

Q Had you ever had any information about this organization employing illegal aliens?

A No information had come to my attention of that nature.

Q Now, specifically, did Mr. Bradley indicate to you that he wanted a court order to interview the witness — I'm sorry, to interview his employees on company time, whereas he didn't care what they did at lunch time? Is that correct?

A He indicated to me we could return at noon when his employees would be eating lunch and interview them at that time.

Q But he didn't say it would have to take place outside; he didn't say it could be inside or outside?

A I interpreted his remarks — I construed his remarks to mean we could return when the individual was not actually working on company time and interview them anywhere we chose.

Q Whether it'd be inside the plant or outside?

A Inside or outside.

MR. LEADBETTER: I have no further questions at this time.

THE IMMIGRATION JUDGE: Do you, Mr. Haffer?

MR. HAFFER: I have a few to follow up some of the answers to Mr. Leadbetter's questions.

BY MR. HAFFER:

Q You stated that you previously conducted interviews in similar locations, and you gave an example of a foundry.

A Right.

Q I assume by that that the inside of this shop had a similar appearance or layout as the foundry?

A Yes. It's very similar.

Q You also stated that when you went to the foundry or factory or transmission company that as a matter of courtesy you went to the person in charge, the foreman, whatever —

A That is correct.

Q — to tell him you were there.

A That is correct.

Q Was the only reason you went to the person in charge a matter of courtesy or also a matter of law?

A It's a matter of courtesy since from what we could see this establishment —

Q I'm speaking of previous situations, the foundry. You wouldn't consider a foundry to be a public area, would you?

A It was a matter of courtesy, Mr. Haffer.

Q So you didn't think you had to do that legally, but just as a matter of decency or courtesy.

A We have to get more specific here. I can't answer that question. It depends on the exact situation.

Q You testified that in your experience nobody ever denied you permission before to interview employees.

A That's true.

Q You also testified you went as a matter of courtesy to the foreman or to the boss or whoever, and you gave an example of a foundry you apparently had gone to. My question is whether or not you went to them only as a matter of courtesy or whether you went to them because you thought you had to under the law.

A No. I don't have to. As a matter of law, I advise somebody that I'm going to enter their premises.

Q So, you testified you entered a foundry, went directly to the employees without talking to anybody in charge and interviewed them without cause, apparently, about their immigration status in the United States.

A That's not what I testified. I stated that as a matter of courtesy I would go to the foreman; if the foreman was half-way cooperative and agreed to confirm or acknowledge in some way that these individuals were there, he would make arrangements for us to interview them.

Q You keep on saying "as a matter of courtesy." Let's say, for example, one day you don't feel like — you don't think courtesy is important, you think — you knew the foreman is a person you couldn't deal with, like Mr. Bradley, who would not give you permission to interview his employees and would cause some problems.

A I would have taken the same action, Mr. Haffer, as if this was a public establishment.

Q But the point is, you would do it out of a matter of courtesy, not as a responsibility, a legal responsibility that you feel you have.

A If it was a private area, I would have sought permission—

THE IMMIGRATION JUDGE: Wait a minute. Let me interrupt here.

Q What do you mean by "private" and "public area" in this context? You've got me puzzled. Do you mean that if a shop is opened you can walk into any part of the shop? I'm asking Mr. Eddy that.

A No. If I had walked into the office and the office was obviously separate from the shop area and there was a sign saying "authorized personnel only," I would not in that case have gone into the shop and started interviewing the employees.

Q But because you didn't walk into an office, you walked in through this opened door in Transco, you thought that you could go anywhere in that shop?

A There was no one telling us not to when we walked in. There were no signs instructing—

Q Did you think that Transco was a public place, the entire premises of Transco?

A When we entered the door, the area inside the door was a public place, yes. The place where we were, I would describe as being a public place.

Q How about the place where Mr. Lopez-Mendoza was, that is, the person working who turned out to be Mr. Lopez-Mendoza? Was that also a public place where he was working?

A It's one big room, Your Honor.

Q It is true that these photographs are not in evidence yet. But assuming that these photographs, which I have marked Respondent's Exhibits "A" and "B" for Identification, are photographs of Transco, take a look at Exhibit "B" for Identification. Would you say that that represents — that that is a photograph of a public place?

A If the photograph was taken from immediately inside the door. It could have been taken from immediately inside the door. Anybody exiting or entering the premises would have to enter into this type of situation.

Q You thought you were free to go anywhere portrayed by that photograph, Respondent's Exhibit "B" for Identification? Is that your testimony?

A After we had entered the place — we were already in the establishment and had already proceeded into the interior of the building to talk to Mr. Bradley. We were there for a specific reason. I felt that I was completely within my authority to be within that establishment at that time.

THE IMMIGRATION JUDGE: Go ahead, Mr. Haffer.

BY MR. HAFFER:

Q Just one brief question. I believe you testified previously that Mr. Bradley was about ten yards or thirty feet inside the door.

THE IMMIGRATION JUDGE: No. He testified that Mr. Lopez was ten yards from Mr. Bradley.

BY MR. HAFFER:

Q Let's clarify that. Exactly how far from the door was Mr. Bradley when you went to talk to him?

A Okay. I really can't recall the exact layout of the operation. But Mr. Lopez was closer to the door and closer to us than Mr. Bradley was.

Q Let's go back again. Approximatley how far from the door was Mr. Bradley, or Mr. Lopez, either one, if you can recall?

A I would say probable ten or fifteen yards.

Q Okay. A couple of other questions I have. You indicated also, I believe, in your answer to a question by the trial attorney, that if Mr. Lopez had refused to answer your questions, had turned his back and had walked away, you would have left and called it a day. Is that correct, as far as Mr. Lopez is concerned? You wouldn't have arrested him, in other words?

A I wouldn't have pursued the conversation at that time.

Q Would you have arrested him at that time?

A No, I wouldn't have.

Q You would have let him go back to his work and would have left the company, or Transco, without arresting him?

A That is correct. I had no idea who Mr. Lopez was without his answers. I have nothing if he doesn't want to answer my questions.

Q If his name had appeared on the list of seven that you had, would you also have not arrested him if he refused to answer?

A I would not have pursued the conversation.

Q You would not have arrested him?

A That is correct.

Q So your testimony is, his answers to your questions were voluntary?

A That is correct.

Q Did you inform him of this, that it was voluntary?

A No, I identified myself, I asked him his name, whether or not he was an alien, where he lived.

Q So you don't know whether he thought they were voluntary or not?

A It doesn't matter. It's irrelevant.

Q If it was irrelevant to you, do you think it was irrelevant — I withdraw that question. You will agree, however, that the question of whether anything is voluntary, it's important to understand or know that the person thinks whether it's voluntary or not.

MR. LEADBETTER: I'm going to object to that, Your Honor. I think we're getting into an area of psychiatry here as to what he thinks.

THE IMMIGRATION JUDGE: No, Mr. Leadbetter. You are overruled.

MR. LEADBETTER: He's going to testify as to what somebody thinks.

THE IMMIGRATION JUDGE: That isn't what he asked him. Again, you're not listening to the question. As I understood it, it was, don't you think it's important for the person to feel that his answers are voluntary? Isn't that what you asked him, Mr. Haffer?

MR. HAFFER: The question, more or less, that I asked was — the point that I'm trying to make is that the issue is the point of view of the person who is being asked.

THE IMMIGRATION JUDGE: Right. That's what I thought.

MR. HAFFER: It is whether they know it is voluntary or not that mattered. He testified previously that it didn't matter. I just want it clarified that it does matter.

THE IMMIGRATION JUDGE: It has nothing to do with psychiatry, Mr. Leadbetter.

MR. LEADBETTER: I'm talking about a feeling.

MR. HAFFER: I don't want to pursue this. I'm not concerned about it. I just wanted —

THE IMMIGRATION JUDGE: He wants to know, as I understand it, whether Mr. Eddy feels it is important for the person he is questioning to realize that he may refuse to answer if he wishes to. Isn't that what you're after, really?

MR. HAFFER: That's fine.

BY MR. HAFFER:

Q Is there anything Mr. Lopez did or said which indicated to you that he thought the answers were being answered voluntarily?

A He answered the questions readily. I was not interrogating Mr. Lopez. I was engaging him in a casual conversation. I asked him — I said, "Do you mind if I ask what your name is, where you're from?"

Q You were asking him questions for the purposes of an immigration investigation, were you not?

A Yes, I was.

Q You were passing the day, asking on a purely social level, were you?

A No, I was not.

Q So, in fact, although, perhaps, your approach was one of — it was a soft approach, in fact you were asking him questions in the furtherance of an immigration investigation.

A That's correct.

Q One last series of questions I have is about the question of a search warrant. You testified, I believe, that you didn't believe you had enough information to apply for, or sign an affidavit, an application for a search warrant. Is that correct?

A That's correct.

Q Did you talk to anybody in the Immigration Service about whether or not you had sufficient information?

A Well, nobody is going to convince me to execute an affidavit unless I'm convinced myself, Mr. Haffer. I didn't discuss it with anybody else because I knew there wasn't sufficient information.

Q What information do you need for a search warrant?

A I would want some kind of overwhelming proof that would convince me that — somebody I knew, for instance, somebody I had handled before, or somebody that I could pull out a prior record of apprehension and say, yes, this is Adan Lopez, I knew that person to be working at Transco Transmission Company on a prior occasion. I knew him to be an illegal alien on a prior occasion. That is sufficient cause.

Q Do you believe you require the same amount of cause for a search warrant as for an arrest warrant?

A No, I don't.

Q What is the difference?

A I didn't think the case warranted a search warrant. I was going down there to interview these people. I expected them to, you know, say, "Sure, I'll talk to you, I'll answer your questions." I wasn't going down there to arrest them or bust down the door. I was going down to talk to some people. Mr. Haffer.

Q The fact that there were seven illegal aliens there, you knew that probably —

MR. LEADBETTER: I object to that, Your Honor. Mr. Haffer said that there were seven illegal aliens. Well, unless Mr. Haffer knows something we don't that there were in fact seven illegal aliens—

THE IMMIGRATION JUDGE: Why do you object to that?

MR. LEADBETTER: Because before he had stated — made an issue about how many people were there.

MR. HAFFER: He had a list saying that seven illegal aliens were working there.

MR. LEADBETTER: They were working there?

MR. HAFFER: No. He said he had a list.

MR. LEADBETTER: He suspected. He didn't know.

MR. HAFFER: I will rephrase my question.

BY MR. HAFFER:

Q If you went to Transco with a list of seven and you found, hypothetically found seven alleged or suspected illegal aliens working there and you went there for the purpose of conducting — questioning and entering on the premises, you knew, did you not, that you probably were going to be making arrests?

A That is correct.

Q So, in fact, you were aware that if this information was correct, even in part correct as far as the numbers were concerned, that you were going to be making arrests when you entered Transco?

A No, I did not. I really can't see that those two questions follow one another.

THE IMMIGRATION JUDGE:

Q Why did you go there?

A I went down there to interview people to ascertain the validity of the information provided by Gloria Gutierrez.

Q What Mr. Haffer seems to want to know is—

A I had no idea who was there.

Q I realize that. But you went there because you must have thought they might be there. Didn't you realize that if they were there you would have arrested them—

A No.

Q — if they were illegal aliens?

A I'd say fifty per cent of our encounters with illegal aliens we probably do not arrest. They do not involve arrests whatsoever in fifty per cent of my personal encounters with illegal aliens.

Q Do you mean if they had family ties or something?

A That's true. I was going down there to interview some people.

BY MR. HAFFER:

Q But if there were seven illegal aliens you would have arrested half of those. Is that correct?

THE IMMIGRATION JUDGE: What difference does that make, Mr. Haffer?

MR. HAFFER: The difference is—I want to try to establish for the record the fact he had reason to believe he was going to be making arrests when he went down to Transco.

WITNESS: I had reason to believe there were illegal aliens.

BY MR. HAFFER:

Q What is the difference between the probable cause required for a warrant of arrest and the probable cause required for a search warrant, as far as you know?

A I don't know.

THE IMMIGRATION JUDGE: Mr. Haffer, you are asking him the question. What is required in your judgment for a search warrant?

MR. HAFFER: I think it's quite clear that the information of an informant can be used as the basis for a search warrant. I think in a case where they give the names, the countries of origin and the place of employment with specificity, that a warrant would issue there and I think it is certainly a type of case where even if a magistrate might decide against issuing a warrant, it would be something

where the investigator should be obliged to attempt such a warrant or attempt to obtain such a warrant. I think in this type of case where he especially called back, he talked with the woman again, he confirmed some aspects of the previous information she had supplied to the Service in this case, that type of case is where a magistrate would probably, especially an immigration case, have given him a warrant to search.

THE IMMIGRATION JUDGE: Mr. Haffer, do you feel that more is needed for a search warrant than for an immigration officer to make an arrest without a warrant?

MR. HAFFER: That more is needed for a search warrant than to make an arrest without a warrant? I think the key difference is, an arrest without a warrant is only on the — with the suspicion, with the likelihood that the person is going to escape prior to obtaining a warrant. As you know, the level required — the level of probable cause required for arresting a suspected illegal alien is very low as compared to a criminal case.

THE IMMIGRATION JUDGE: Is probable cause the test?

MR. HAFFER: I think the courts have held that — I think the immigration law itself doesn't say "probable cause." It says "reasonable —"

THE IMMIGRATION JUDGE: "Reason to believe."

MR. HAFFER: But I think the courts have established the difference between "reason to believe," as contained in the immigration law, and "probable cause" is somewhat minimal. They have established, for example, in many cases involving arrest of Spanish-speaking people in the Southwest, there are certain requirements above and beyond the general "reason to believe."

THE IMMIGRATION JUDGE: But, as I remember, the most recent Supreme Court decision deals with "reason to believe" rather than "probable cause."

MR. HAFFER: True, but "reason to believe" is more than just simple reason to believe in layman's terms.

THE IMMIGRATION JUDGE: I realize that. There was an attempt in one of the cases to set forth certain additia [sic], certain elements which would give an immigra-

tion officer reason to believe, which were less than probable cause.

MR. HAFFER: Yes, they were. They were less than probable cause.

THE IMMIGRATION JUDGE: Would you say that for a warrant, a search warrant for immigration purposes —

MR. HAFFER: Your Honor, my point is this —

THE IMMIGRATION JUDGE: Would you — let me ask you this question. Does an immigration officer applying for a search warrant, that is, a warrant which would enable him to go to a certain premise to ascertain whether there were illegal aliens there, does he have to establish probable cause or something less?

MR. HAFFER: No. I think to establish — to apply for both a warrant of arrest and a search warrant, he does not have to establish probable cause.

THE IMMIGRATION JUDGE: I think you are right. I am inclined to agree with you. That's why I asked you the question. I wanted to see your position.

MR. HAFFER: I think the operative point is this. If you have reason to believe, as the cases have established what that means, in an arrest situation, for example, if you have reason to believe a person is here illegally, the only reason which justifies an arrest without a warrant is that they are likely to escape or escape before a warrant can be obtained. The same level of reason to believe can and should be used to apply for a warrant of arrest from the District Director. I think the same thing applies under the holdings in those cases as well as the immigration law itself in applications for a search warrant. I think quite likely even a magistrate in a United States District Court would be more likely to grant a search warrant with even less level of reason to believe than they would require for an arrest warrant because in general criminal and ancillary matters the criminal requirements for search warrants are substantially more liberal.

THE IMMIGRATION JUDGE: Off the cuff, I think you are probably right. Do you have any other questions of Mr. Eddy?

MR. HAFFER: No, I don't.

THE IMMIGRATION JUDGE:

Q Mr. Eddy, one thing I wish you would clarify. I was making notes when you were testifying and I don't have a complete note on this. But you said something that went like this. When Mr. Bradley refused to let you interview his employee, there didn't seem to be any alternative. What did you mean by that?

A If we left the establishment at that time that we'd never talk to the same individuals again.

Q In other words — you also said something about everybody had heard what had been going on between you and Bradley. Did you feel then that if there were illegal aliens there, they would abscond between the time you left and the time you came back at the lunch period?

A That is correct.

Q So you decided to go ahead and interview as many as you could?

A That is correct. However, we only interviewed one. We wanted to avoid an incident.

Q If you wanted to avoid an incident, why did you interview the one?

A It's our job.

THE IMMIGRATION JUDGE: Are there any other questions by either side of this witness?

MR. HAFFER: I have one question, which you reminded me of.

BY MR. HAFFER:

Q You did testify that Mr. Bradley had given you an indication that if you came back at noon you — he would not object. Is that correct?

A That is correct.

Q This was approximately 8:00 o'clock in the morning, or in the morning sometime?

A Somewhere between 7:00 and 8:00 o'clock. I don't know the specific —

Q When you were in the building, did you know how many entrances and exits there were to the building?

A We did our best to case the place the day before. As far as we could tell, there was only one access and that was — well, two accesses, front doors.

Q Why didn't you go out and wait outside until noon? You would have been able to see who was coming out.

A It was 8:00 o'clock in the morning. I didn't feel like waiting four hours.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you, Mr. Leadbetter?

MR. LEADBETTER: Yes, Your Honor

BY MR. LEADBETTER:

Q Mr. Eddy, based upon a telephone call from a person giving a list of names of aliens, would that be, in your opinion, sufficient to go to the United States magistrate for either a search warrant or arrest warrant?

A No.

MR. LEADBETTER: No other questions, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Eddy.

What do you wish to present next, Mr. Haffer?

MR. HAFFER: May I ask a question? How long are we going to go on? Until noon or —

THE IMMIGRATION JUDGE: What do you want to present?

MR. HAFFER: I want to bring on Mr. Elder. It shouldn't take very long.

THE IMMIGRATION JUDGE: Why don't you start with him and we'll see.

Q What is your full name?

A James Robert Lee Elder.

Q To be sworn, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A I do.

THE IMMIGRATION JUDGE: You may be seated.

Proceed, Mr. Haffer.

BY MR. HAFFER:

Q Investigator Elder, on August 3rd, 1976, did you appear at the offices of Transco in San Mateo, California?

A Yes.

Q Did another officer of the Immigration Service accompany you at this time?

A Yes.

Q Who was that?

A Investigator Robert Eddy.

Q About what time did you appear at the offices of Transco in San Mateo?

A Approximately 7:45 a.m.

Q When you were at the premises of Transco, did you arrest the respondent seated next to me?

A I was part of the arrest.

Q You and the other investigator, Eddy. Is that correct?

A That's correct.

Q He was taken into custody at that time, though?

A That is correct.

Q When you went to Transco, were you in possession of the respondent's name or any information concerning this particular respondent?

A We were in possession of several names.

Q Was the respondent's name among those, do you know?

A The name the respondent gave us was not among the names that we had, no.

Q Do you know how the information was received by the Immigration Service?

A Yes.

Q How?

A An individual called by telephone to inform us that Transco had employed a number of illegal aliens from Mexico.

Q But did — were you involved in that contact with the informant?

A Not directly, no.

Q When you entered the premises of Transco, did anybody from the company greet you at the door?

A No.

Q Did you walk in the door?

A We walked through the door.

Q Was the door opened or closed?

A It was opened.

Q After you entered the premises, what did you do?

A We both, that is, I — Mr. Eddy and I waited near the door in view of all the employees in the premises and waited for someone to come and help us.

Q How long did you wait?

A In my estimation, about five minutes.

Q Did anybody inside the company indicate that they knew you were there or tell you to wait or tell you to come forward or in any way recognized your presence?

A Someone recognized our presence, yes.

Q Do you know who it was?

A At the time I did not know who it was. However, an individual, who — I later found out his name.

Q What is his name?

A Mr. Art Bradley was — identified himself later on by that name.

Q What did Mr. Bradley do as far as recognizing your presence?

A He looked at us, continued to work and made a nodding, or, at least, a motion toward us that he recognized we were on the premises.

Q Did he — how far away from you was he at that time?

A He was about thirty-five or forty feet.

Q Did he motion you to do anything?

A No. He just motioned at us that he recognized us and so we continued to stand near the door hoping that he or some other individual would come over and greet us.

Q Was he working on a machine at the time?

A I couldn't tell, exactly, what he was working on. He evidently was busy standing next to another employee at some type of work.

Q And both you and Investigator Eddy were dressed in street clothes?

A Yes. That's correct, as we were dressed with sport coats, slacks, ties, shirts.

Q So as far as you know, neither Mr. Bradley nor anyone else in the establishment knew you were from the Immigration Service?

A We didn't identify ourselves to anybody. We just merely stood by the door.

Q How long — you said you waited about five minutes by the door. Is that correct?

A Approximately.

Q Then what did you do?

A I continued to stand near the door and Investigator Eddy walked over to Mr. Bradley and at this point I'm not completely sure of all that took place because it was noisy inside of the building. But, at any rate, he apparently was talking with Mr. Bradley.

Q You stayed by the door during this time?

A I was near the door, yes.

Q How far from the door were you?

A About ten feet, twelve feet.

Q You eventually left that position by the door, did you not?

A Yes.

Q Could you describe the circumstances when you left your position near the door?

A I walked a little bit further into the premises as Mr. Bradley was casually walking to my direction.

Q Was Mr. Eddy with Mr. Bradley as he was walking towards your direction?

A No.

Q And then what transpired after you were gradually walking in the direction of Mr. Bradley?

A I identified myself to Mr. Bradley as an officer of the United States Immigration Service.

Q Did you converse with Mr. Bradley then?

A Very briefly. He finally indicated in a subtle, or, at least, a low-key fashion that he didn't appreciate us being there any longer.

Q Did you then approach the respondent in this case, Mr. Lopez-Mendoza?

A No.

Q Did Mr. Eddy approach the respondent in this case?

A Mr. Eddy simultaneously had approached Mr. Lopez.

Q Simultaneously as you were talking to Mr. Bradley?

A Just slightly before I talked to Mr. Bradley.

Q About how far from the door was Mr. Lopez-Mendoza when Mr. Eddy approached him?

A Are you talking about the front door?

Q The front door or the door you entered through.

A Mr. Lopez, in my estimation, was approximately thirty-five feet from the door.

Q Do you have any idea what the size of the entire establishment is?

A I have some idea, but —

Q Was thirty-five feet approximately halfway in the establishment from the door, do you recall?

A I would say thirty-five feet would be approximately one-third to one-half way into the premises.

Q Were you aware that Mr. Bradley or one of his employees was calling in local law enforcement officers in this case?

A Yes.

Q Were you there when he indicated he intended to call the police?

A Yes.

Q Did you comment to him one way or the other whether or not he should call the police?

A Yes, I did.

Q What did you tell him?

A I encouraged Mr. Bradley, or his employee, excuse me, to call the police.

Q Did Mr. Bradley ever ask you for a warrant or for an order from — a court order to enter the premises or to arrest the respondent?

A I don't know if he ever asked specifically for a warrant.

Q Did he mention a warrant or a court order?

A Yes.

Q In what context did he mention it?

A After we had left the premises, or, at least, on the way out of the premises, he mentioned that we should have a warrant, or, at least, some sort of document of this nature to come into his premises.

Q You testified before that Investigator Eddy spoke with Mr. Bradley first. Is that correct?

A That's correct.

Q Could you hear what they were discussing?

A No. It was too noisy.

Q This was while you were still waiting by the door. Is that correct?

A I don't understand.

Q Mr. Bradley and Mr. Eddy had their conversation, their first conversation while you were still waiting by the door. Is that correct?

A That's right.

Q What are the powers of an immigration officer to arrest or make an entry without a warrant?

A Excuse me. I didn't understand your question.

Q What power do you have as an immigration officer to enter a particular place without a warrant?

A We have authority to enter certain dwellings or lands without a warrant.

Q What dwellings or lands are those?

A We can enter public places.

Q Without a warrant?

A Not in all cases, perhaps, but we have — versus entering a private residence, we have more authority to enter public lands or premises.

Q What authority do you have to enter a private dwelling without a warrant?

MR. LEADBETTER: I'm going to object to that question, Your Honor. A private dwelling is not involved here.

MR. HAFFER: He mentioned he had a right —

MR. LEADBETTER: No. He said "dwelling."

BY MR. HAFFER:

Q I'm sorry. What authority do you have to enter a dwelling without a warrant?

A I'm not sure I can answer because that's kind of a broad question without going into kind of a lecture.

Q Well, let's see if we can —

THE IMMIGRATION JUDGE: A dwelling wasn't involved here, Mr. Haffer. Why go into that?

MR. HAFFER: I want to see what his general knowledge is. I was going to try to have him define what a public place is.

BY MR. HAFFER:

Q You indicated you would enter a public place without a warrant.

A Yes.

Q What is a public place?

A It would be a place where the public is allowed to enter.

Q All places where the public is allowed to enter?

A I can't comment on exceptions to the rule.

Q But, as a generalization, a public place would be all places, with some exceptions? But, in general, a public place is a place where the public may enter, all places where the public may publicly enter?

A Yes, as far as I know.

Q Did you assume that this location at Transco was a public place?

A Yes.

Q The entire premises?

A We assumed that as a place of business that it was for the most part open to the public, yes.

Q But you wouldn't consider a factory, for example, to be a public place, would you?

A Well, do you consider this a factory?

Q Transco? Are you speaking of Transco?

A Yes.

Q That is a question I wanted to ask you. Do you consider Transco to be a factory?

A In my opinion, no, it's not a factory.

Q Were there machines in the local [sic] that are used for the repair of certain mechanical parts, transmissions, specifically?

A Yes.

Q There were a number of machines, were there not, in that location when you went there?

A Yes.

Q They were operating?

A Yes.

Q There were a number of employees standing around in certain areas, when you entered, working? Is that correct?

A Yes. That is correct.

Q Is that a factory or not?

A It's a business.

Q Well, then, I'll go even further. Do you consider a business where people are working on machines to be a public place?

A In some cases, yes.

Q In this case?

A Yes.

Q If I may, I'd like to show you Respondent's Exhibits "A" and "B" for Identification and see if you can identify this as the interior of Transco. Does that appear to be the interior of the company in question?

A Without seeing any address or without comparing the photos to Transco in San Mateo, the photographs do resemble the interior of Transco.

Q So, in general, even if you aren't sure it is the exact place, it has the general appearance that Transco had?

A Yes.

Q Would you consider—I'm showing you now Respondent's Exhibit "B" for Identification. Would you consider this to be a public place?

MR. LEADBETTER: I'm going to object to that, Your Honor. Just showing him a photograph and saying nothing more, it could have been a picture of a garage with machines —

THE IMMIGRATION JUDGE: You are overruled, Mr. Leadbetter.

WITNESS: From the photograph I couldn't say one way or the other.

BY MR. HAFFER:

Q Okay. Were you with Investigator Eddy when he, I think he said he cased the establishment on the 2nd of August?

A Yes.

Q What was the purpose of casing the establishment the day before?

A To find out where the establishment was located and to get a general idea of how big it was, what type of force, that is, the amount of men that we would need to do a good

job as law enforcement officers. Also to find out whether or not it's a feasible type of a lead to investigate further.

Q Did you also check out in this particular case how many entrances and exits there were to the establishment?

A Not in detail, no.

Q That wouldn't be part of casing the establishment, to determine the amount of force needed to investigate or to

—
THE IMMIGRATION JUDGE: To what. You didn't finish your question.

BY MR. HAFFER:

Q To investigate, period.

A It could be.

Q Do you happen to know off the top of your head how many doors this establishment has?

A No. I still don't know how many doors the establishment has.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have anything of the witness, Mr. Leadbetter?

BY MR. LEADBETTER:

Q Were you present when Mr. Bradley made any statements concerning a court order or court papers to come on the premises?

A Yes.

Q Did he make any statements regarding — that he wouldn't object, or, really, no comment, if you interviewed people at lunch time rather than on company time?

A I apparently was not directly in conversation with Mr. Bradley when he mentioned that particular statement, if he did mention it.

Q Now, at the time that you physically took the respondent into custody, were you standing next to Mr. Eddy when he was engaged in conversation with Mr. Bradley?

A I'm sorry, but I'm not sure I understood the question exactly.

Q When Mr. Bradley was standing in front of the alien

—

THE IMMIGRATION JUDGE: That hasn't been established from this witness, Mr. Leadbetter. Why don't you start this way.

Q Who took — who arrested Mr. Lopez, Mr. Elder?

A The point at which Mr. Lopez was considered detained and to the point of perhaps being in custody was after Investigator Eddy had talked to Mr. Bradley. Investigator Eddy approached Mr. Lopez alone and brought Mr. Lopez over to Mr. Bradley.

Q Did you then consider that he was under arrest, or detained, as you put it, or did that occur later?

A We were planning on taking Mr. Lopez into our custody and I suppose as a matter of formality we were informing Mr. Bradley of this fact.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q At this time were you standing next to Officer Eddy?

A At which time?

Q At the time that — after he had accompanied Mr. Lopez over to where Mr. Bradley was standing?

A We eventually were all standing in a small group, yes.

Q What ensued as to the actual taking of Mr. Lopez from the premises?

A Mr. Bradley informed us that he would not allow Mr. Lopez to leave the premises.

Q Where was he standing when he advised you of this?

A In front of Mr. Lopez.

Q What was his stance?

A That's a hard question. Basically he was tense, upset, and he appeared to be in somewhat of a defensive demeanor.

Q Did you notice whether his fists were clenched or not?

A No.

Q All right. Then what transpired between Mr. Bradley and Mr. Eddy?

A Mr. Eddy, that is, Investigator Eddy informed Mr. Bradley that we were planning on taking Mr. Lopez into

our custody and that it would be best if he cooperated with us.

Q Did either you — did either you or Mr. Eddy display your weapons at all?

A No.

Q Did Mr. Eddy at that time make any points emphatically to Mr. Bradley with his finger?

A Yes.

Q What did he do?

A He used his finger as a gesture indicating that Mr. Bradley should not interfere with our duties.

Q Now, at that time, did you feel that Mr. Bradley was interfering with your taking into custody the alien?

A He said that he would not let the alien leave the premises.

Q But all he said was —

MR. HAFFER: Excuse me, Your Honor. I'd like a clarification here. It seems with the last several questions that the point of Mr. Leadbetter is to determine whether or not Mr. Bradley interfered, perhaps criminally interfered with the conduct of the immigration officers. That doesn't seem to have anything to do with whether the entry of the arrest, which had already occurred prior to that time, was legal. I'm wondering what he is getting at. Is he after a determination of whether the entry and the arrest were legal or is he trying to obtain information as to Mr. Bradley's possible criminal conduct?

MR. LEADBETTER: Your honor, if, in fact, Mr. Bradley was engaged in a course of conduct to aiding and abetting or harbouring illegal aliens or interfering, and subsequently this is proven to be a lawful arrest, this could be a matter of public concern.

THE IMMIGRATION JUDGE: This isn't the place to develop that, Mr. Leadbetter.

MR. LEADBETTER: I think it's a proper point to bring out, Your Honor, if, in fact, this is a satellite question. Nonetheless, the officer should testify as to what transpired at —

THE IMMIGRATION JUDGE: Is there an objection, Mr. Haffer?

MR. HAFFER: Yes, there is.

THE IMMIGRATION JUDGE: It is sustained. We are only interested in hearing whether or not there was a lawful search and a lawful arrest.

MR. LEADBETTER: Then I take it the Court is not particularly interested as to what transpired between Mr. Bradley and the officers?

THE IMMIGRATION JUDGE: After the arrest took place.

MR. LEADBETTER: But prior to the arrest? If he made the statement, "you can't take somebody from the premises," of course—

THE IMMIGRATION JUDGE: The question is when. That's what I asked Mr. Elder before, when did he consider Mr. Lopez arrested. It seemed to me from Mr. Eddy's testimony that Mr. Lopez was under arrest when Mr. Eddy walked over to Mr. Bradley with Mr. Lopez.

MR. LEADBETTER: At the time he interviewed him and found out his circumstances he had started to walk —

THE IMMIGRATION JUDGE: He stated he put him under arrest then.

MR. LEADBETTER: That's when Mr. Bradley stood between the —

THE IMMIGRATION JUDGE: That happened after the respondent was under arrest. Isn't that your understanding?

MR. LEADBETTER: Yes. But, of course, I was concerned with as to where he was at this time, because the issue came down as to a confrontation and removing the alien from the premises.

THE IMMIGRATION JUDGE: That's the point to which Mr. Haffer objected. I sustained his objection. I think we've heard enough about that.

MR. LEADBETTER: Yes, Your Honor.

BY MR. LEADBETTER:

Q Now, the question came up about calling the police. Who first mentioned —

THE IMMIGRATION JUDGE: Why is it necessary to go into that again?

MR. LEADBETTER: It is, Your Honor, because the issue has come up as to apparently some type of questions as to going to — not arising — I think it should be on the record as to —

THE IMMIGRATION JUDGE: Why did you ask Mr. Eddy that question, Mr. Haffer?

MR. HAFFER: Because, according to our witnesses, they are going to testify the immigration officers told them not to call the police.

THE IMMIGRATION JUDGE: What difference does that make?

MR. HAFFER: It makes no difference as far as the — as far as the actual arrest and entry. It's just an indication that it seemed to the people involved that the Immigration Service was acting lawlessly.

THE IMMIGRATION JUDGE: What did the police have to do with an immigration arrest?

MR. HAFFER: The respondent — Mr. Bradley wanted to call the police because he felt that there was something illegal going on in the arrest and the entry. But I will stipulate to the fact that they called the police. I don't know if Mr. —

THE IMMIGRATION JUDGE: Why do you want to ask him about that, Mr. Leadbetter?

MR. LEADBETTER: The question is, apparently the officers encouraged calling the police because they felt that with the number of persons there and the particular stance of Mr. Bradley that they were fearful of a potential assault on their persons as officers, Your Honor, and they welcomed the San Mateo County Police coming because of this.

MR. HAFFER: But Mr. Bradley was calling the police.

MR. LEADBETTER: They — in effect, the officers wanted that because at that time they were concerned for their personal safety as being assaulted by either Mr. Bradley or by the other employees in the shop.

MR. HAFFER: They left prior to their coming.

MR. LEADBETTER: It's a question as to encouraging the man to call the police and I think that is —

THE IMMIGRATION JUDGE: Mr. Leadbetter, Mr. Elder already testified, if I remember correctly, that he wanted Mr. Bradley to call the police.

MR. LEADBETTER: He never stated as to why. Your honor. I think it should be on the record.

THE IMMIGRATION JUDGE: Let it be on the record, then.

BY MR. LEADBETTER:

Q Mr. Elder, getting into the area, again, as to calling the police, who first suggested that the local police be called?

A Mr. Bradley.

Q Do you recall his words, the statements he said?

A "I'm going to call the police."

Q Who did he say that to?

A To us, to Investigator Eddy and myself.

Q What was your reply to Mr. Bradley's statement?

A I told him to please call the police, most emphatically.

Q Why were you so emphatic in wanting the local police there?

A Because of the fact that it looked like an incident would soon arise and if the police would come I thought it would calm the situation down.

Q What particular incident would arise?

A Mr. Bradley was very — well, he had a big objection to us taking Mr. Lopez from the premises. He started to get quite angry and, of course, Investigator Eddy was opposed to this way of thinking and Investigator Eddy became emphatic that we carry on our duties. Investigator Eddy and I were the only two investigators there. There was Mr. Bradley, Mr. Lopez, and all the other employees and we had no idea what their opinions or ideas about the entire thing were like. I encouraged him to have the police called.

Q Were you in fear that this would go more than just a verbal argument, that there'd be physical force used upon —

MR. HAFFER: I object, Your Honor. This has nothing to do with the issue we're talking about today.

THE IMMIGRATION JUDGE: You are the one who raised the issue of the police, Mr. Haffer.

MR. HAFFER: But raising the issue of the police I don't think has anything to do with whether or not the officers had the fear —

THE IMMIGRATION JUDGE: I don't think you have to probe this further, Mr. Leadbetter.

MR. LEADBETTER: I'd just like an answer to that question, Your honor.

THE IMMIGRATION JUDGE: You can ask him this. "Was there any other reason why you encouraged Mr. Bradley to call the police, Mr. Elder?"

BY MR. LEADBETTER:

Q Mr. Elder, would you answer?

A Because I felt that we were not against the police being there. We felt that we were within the law and there was no reason to exclude the police if they were asked to come out to the premises.

THE IMMIGRATION JUDGE: Do you have anything else, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Elder.

Unless you have something else, Mr. Haffer.

MR. HAFFER: No. I have nothing further.

THE IMMIGRATION JUDGE: You are excused, Mr. Elder.

Before we resumed the hearing after the recess, Mr. Haffer informed me that he would not be available for further hearing till about two o'clock. Is that so, Mr. Haffer.

MR. HAFFER: I indicated two-thirty. But I could probably be back about two-fifteen.

THE IMMIGRATION JUDGE: Two-thirty would be all right. Come back as soon as you can. I have a one o'clock hearing which should be finished before two-fifteen.

MR. HAFFER: Okay.

THE IMMIGRATION JUDGE: One never knows. We will take a recess at this time till two-fifteen.

THE IMMIGRATION JUDGE: The hearing is resumed. Mr. Haffer, before we proceed, I would like you to clarify something. When you were talking during the morning session of this hearing about the Service obtaining a search warrant from a United States magistrate on less than probable cause, were you referring to a criminal proceeding or a civil proceeding?

MR. HAFFER: I was referring to a civil proceeding.

THE IMMIGRATION JUDGE: I assumed that. I just wanted the record to be clear that it's your position they could get such a warrant on less than probable cause.

MR. HAFFER: Yes, Your Honor. If I could briefly summarize it, I think the only analogy we have in the entire federal, or state law, for that matter, is the Public Health Service problem of quarantine for administrative arrests and administrative searches. I think that the magistrate has the power under federal law to issue administrative civil search warrants in immigration cases where the alleged violation is one of the Immigration and Nationality Act civil sections as opposed to criminal sections on less than probable cause. And it appears to me that the level of knowledge which is required would be similar to that required under Section 287 of the Immigration Act for arrest and that is a reasonable belief or reasonable suspicion. I think, obviously, when it comes to a criminal violation of the Immigration and Nationality Act the same level of probable cause is required for issuing a warrant, as for any other criminal case.

THE IMMIGRATION JUDGE: At the time I declared the recess this morning for the luncheon period, you indicated that you wished to present several witnesses, Mr. Bradley and others.

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: Before we go to that, will you state for me your contention in this case? You made a motion that the Order to Show Cause should be dismissed and I permitted you to present evidence in support of your motion. What is your contention?

MR. HAFFER: Our contention is as follows. That the entry of immigration officers onto the premises of Transco, where the respondent was employed, and his subsequent

arrest, detention and arrest by immigration officers was invalid, illegal, and that, therefore, this Court has no jurisdiction to hear this deportation proceeding at this time.

THE IMMIGRATION JUDGE: What is the basis for your contention that the detention and arrest were invalid and illegal?

MR. HAFFER: Our contention is that the immigration officers had sufficient time to obtain a warrant for the respondent and failed to do so, and, therefore, the powers given to the immigration officers under Section 287 of the Act to arrest without a warrant were not properly exercised.

THE IMMIGRATION JUDGE: You don't mean a warrant with regard to Mr. Loepz, do you?

MR. HAFFER: I do, Your Honor.

THE IMMIGRATION JUDGE: They didn't know about his presence by name, at least.

MR. HAFFER: In our offer of proof we will show that they did allege that they did in fact know him by name.

THE IMMIGRATION JUDGE: Oh, yes. You did ask Mr. Eddy whether he had told you previously that Mr. Lopez's name was on that list he allegedly had.

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: When you said "obtain a warrant," were you talking about a search warrant or a warrant of arrest?

MR. HAFFER: Both. I think in this situation a search warrant would have been sufficient to allow the officers to enter onto the premises and question the people thereon. And if prior to that they did have specific information about specific individuals, also an arrest warrant would be proper. It's also our contention from this morning's testimony, Your Honor, that the officers not only had time prior to this incident to obtain a warrant, but they also had time subsequent to talking with the respondent to have effected an arrest without violating the rights of Mr. Bradley and Mr. Lopez.

THE IMMIGRATION JUDGE: Say that again. I didn't

MR. HAFFER: Our contention is also that subsequent to the first contact the officers had with Mr. Lopez, they still could have effected an arrest in this case without violation of the respondent's and Mr. Bradley's constitutional rights by having waited outside until noon, or outside until the workers went home, in which case there would have been no problem about the question of entry and search, illegal search and seizure.

THE IMMIGRATION JUDGE: Since declaring the luncheon recess, I have, as I told you when you returned to the courtroom this afternoon, given this matter a great deal of thought. I think you will agree it is a puzzling situation. The whole question of applicability of the laws against unlawful search and seizure and unlawful arrest to immigration proceedings is very troublesome, to say the least. I know, because I have discussed this with you that you will agree there is no precedent decision covering the exact situation that you claim happened in this case. I have decided after considerable thought not to hear any further evidence on the issue of unlawful search. But I will permit you to make an offer of proof on that issue with regard to the evidence you had intended to present this afternoon. So you may now do so.

MR. HAFFER: If I may, Your Honor, just prior to commencing that, I would like to refer you to one series of decisions, perhaps relevant to this case. And I don't have the citations with me now, but I'd be glad to supply them to you. This deals with the applicability of Fourth Amendment and Fifth Amendment protection to noncriminal proceedings and, specifically, they deal with the confinement of mentally retarded or insane people, and recently, also juveniles. In recent cases there has been expansion of the right of the Fourth and Fifth Amendments to cover those noncriminal penalties which would seem to be somewhat analogous to the situation here. Although I do agree there has been no case which has held — been directly on point with this case. I will furnish you with those citations as soon as possible. I have them in my office. The first thing I'd like to do, Your Honor, as an offer of proof relates to the two photographs which have been labeled — marked as

Exhibit "A" for Identification and Exhibit "B" for Identification for the respondent. Mr. Bradley, the owner of Transco, will — would have testified that these photographs were taken by a professional photographer named Jorge Gonzalez on July 7, 1976, and that they are two views taken from approximately the same position, one looking forward and one looking toward the rear of the shop, and this is, in fact, how the shop appears — appeared at the time of the entry of the immigration officers on August 3, 1976. We, therefore, would like them to be entered in evidence at this time. Furthermore, Mr. Bradley was to have testified and was to have confirmed most of the information that was received this morning from Investigators Eddy and Elder. There are a few things, however, that would have been in contradiction with what was offered this morning in evidence. Specifically, Mr. Bradley would have testified he had indicated to the immigration officers to wait for him by signaling them to wait at the front door, that he was in the process of doing some work and would be with them in a few minutes and that they entered afterwards without waiting for him to come and greet them.

THE IMMIGRATION JUDGE: Was that when they were in the doorway or after they had passed through the door?

MR. HAFFER: When they were waiting inside the door.

THE IMMIGRATION JUDGE: They had already come through the door, then?

MR. HAFFER: Yes.

THE IMMIGRATION JUDGE: In other words, his gesture was one of "wait for me"?

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: He would also have testified that Investigator Eddy came to him first and asked him to take and question one of his men and mentioned Adan Lopez Mendoza by name prior to having talked with the respondent. At this time was when Mr. Eddy indicated there was some discussion as to the right of the officers to be on the private property and Mr. Bradley indicated at this time he wanted

some form of court order or warrant for them to remain on his property and talk with his employees. He indicated they could come back after work and talk to the employees, but not during the workday. He asked for a warrant. He was told a warrant was not needed and that the immigration officers could come onto his property without any probable cause and talk to anybody they wanted to. Furthermore, he also indicated that he instructed one of his employees, who also would have been a witness today, to call the San Mateo County Police and that — or the San Mateo City Police, excuse me — and that Investigator Eddy had asked them not to call the police and said, "No, don't call the police" to a man named Nelson Melendez, who is also here today and would have been one of our witnesses. He would further testify he only asked him about one suspected illegal alien, Adan, although there was some indication perhaps they were looking for more, but only one name.

THE IMMIGRATION JUDGE: He is denying that he showed him a list?

MR. HAFFER: He's denying they showed him a list or any other names, that they had asked specifically for his name. In fact, he also would allege that from his conversation they went first to Adan because on his shirt was his name, Adan, and they recognized that name and they went to him first, and as it turned out, was the only person that they took away. We also will have information the officers questioned more than just one man. After talking to Adan they also questioned a Nelson Melendez, again, who, as it turns out, is a permanent resident of the United States. So there was more than one person questioned by the immigration officers, and I think the thrust this morning was that there was only one person questioned because they didn't want to get involved with anybody else because they didn't want —

THE IMMIGRATION JUDGE: They didn't want to cause a problem with Mr. Bradley.

MR. HAFFER: He also would have testified that the public generally did not enter his establishment, that, in general, he goes to places and picks up transmissions to repair and no more than once a week on the average do cus-

tomers walk into his office. It's not a general place of public business. The business of Transco is a wholesale business. I think for most other purposes, Your Honor, the testimony of Mr. Bradley and that of Mr. Eddy would coincide, with those differences. The other person that would have testified this afternoon would have been Nelson Melendez.

THE IMMIGRATION JUDGE: Before you get to that, would Mr. Bradley have testified that Adan Lopez-Mendoza's full name was on his coveralls?

MR. HAFFER: No. Just the name Adan, on his shirt, actually. It's a blue shirt with red writing that you often see in garages and transmission companies.

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: The other witness we would have had today is Nelson Melendez, who is an employee also of Transco and is a permanent resident of the United States. Again, he would have corroborated the testimony of both Mr. Eddy and Mr. Bradley as they coincided. Also, that they asked him for his name and whether he was a resident or citizen of the United States. And also, he was the man whom Mr. Bradley asked to call the police and who the investigator stated or asked not to call the police. Investigator Eddy had asked him or told him not to call the police.

THE IMMIGRATION JUDGE: Why do you make such a point of that calling the police?

MR. HAFFER: It's basically a question of the attitudes of the people. Your Honor. I think one of the reasons we consider this to be such a problem is that when there was indication that Mr. Bradley, the owner of the company, and others wanted to call the police was because they feared something illegal was going on or they wanted to have this matter taken up with the local police. According to their testimony, the immigration officers said, no, don't call the police, which further exacerbated a sense of uneasiness caused by the immigration officers' entry into his private property without his permission. I don't consider it to be a major point, but I do consider it to be a significant point. That's all the evidence I submit today, Your Honor.

THE IMMIGRATION JUDGE: You didn't give me the photographs. Respondent's Exhibit "A" for Identification is entered in evidence as *EXHIBIT "A"*. Respondent's Ex-

hibit "B" for Identification is entered in evidence as *EXHIBIT "B"*.

Mr. Haffer, your motion to terminate the proceeding on the ground that I lack jurisdiction to hear the matter is denied.

The Order to Show Cause and Notice of Hearing is entered in the hearing record as *EXHIBIT 1*.

MR. HAFFER: Your Honor, may I request at this time two things? First of all, may I have a written opinion for your decision to deny the motion?

THE IMMIGRATION JUDGE: When I give a decision on the whole case I will include an explanation.

MR. HAFFER: Then we would like at this time to ask for a continuance of the matter before we get into the case on the merits.

THE IMMIGRATION JUDGE: Why do you need a continuance?

MR. HAFFER: For several reasons. First of all, to be perfectly honest, we expected the entire day to be taken up with the issue on unlawful arrest, alleged unlawful arrest and alleged unlawful entry, and we are not prepared to go forward with the hearing on the merits. In addition, Your Honor, I think it's extremely important because of some of the decisions which you indicated to me during the recess, the decisions which I have stated, that although an arrest may be illegal, unlawful, the subsequent deportation may be lawful. I think once the Order to Show Cause has been admitted and once the Government presents its case, establishes a prima facie case for deportation, any possible issues to be raised in Federal court on the question of unlawful arrest become moot, and I think we should be given a chance at this time to have an adjournment of the hearing to pursue the matter in the United States District Court.

THE IMMIGRATION JUDGE: I don't understand you. What do you want to do in the United States District Court?

MR. HAFFER: We want to do several things. First of all, raise the issue of whether or not at this time the Immigration Service can continue with deportation proceedings. We want to seek a declaratory judgment on the issue of

whether or not the arrest was unlawful and the entry onto Mr. Bradley's property was unlawful. We want to, probably in connection with that, seek a temporary restraining order to restrain further deportation proceedings until a decision is reached by the United States District Court. Those are among the plans we have in the District Court. I think the real issue is this, and I think it is an important one, and we ask for a continuance at this time. I think it is very likely that the United States District Court would consider this case moot if the hearing on the merits takes place and the respondent is found deportable. I think the time to question the legality of the arrest and the legality of the entry is prior to the hearing on the merits. I think we should be given an opportunity to proceed with this matter in the District Court.

THE IMMIGRATION JUDGE: Do you wish to be heard, Mr. Leadbetter?

MR. LEADBETTER: Yes, Your Honor. From the evidence adduced this morning that it seems prominently clear the officers were well within their authority to engage in the activity that they did. Congress specifically invested the Immigration and Naturalization Service with the statutory powers enabling the interrogation of suspected aliens, the right to interrogate as to possible violations of immigration laws and statutory authority grants the immigration officers the right to seek to interrogate individuals reasonably believed to be of alien origin. And the underlying rationale is that the minimal invasion of privacy of the individual approached for questioning is justified by the special needs of the immigration officials to make such interrogations. This allowance for mere questioning which assumes the individual's cooperation is analogous to decisions which have (unintelligible) of authority for police officers. Lau, case 144, U.S. Court of Appeals, District Court 147, and also in accordance Chun Kim Wong Came case vs. Immigration Service, 468 F.2d, 1122. Now —

THE IMMIGRATION JUDGE: You are reading from a memo you have in front of you.

MR. LEADBETTER: That's correct, Your Honor.

MR. HAFFER: Why don't you just submit that.

MR. LEADBETTER: It is in rough form, but I will, Your Honor, because this does — this does indicate that the minimal imposition is more than offset because notwithstanding, and the court has said in the R.E. Lau case that the — we believe the statutory interrogation authority comprehends such minimum detention in this case because there are far greater intrusions upon personal privacy and nonforceable approaches since aliens in this country are sheltered by the Fourth Amendment in common with citizens. And the minimal invasion falling short of a full-blown arrest is such that the practical considerations ought to be considered that the number of individuals seeking to enter this country illegally is quite high and the number of those who succeed in this venture is rapidly increased with each passing year and the ability to gather proof against these illegal entrants depend upon a reasonable opportunity for interrogation is seemingly difficult. So what we have here is that officers are on a lead seeking to make a minimal intrusion on a person's rights as to their origin and lawfulness to remain in the United States and it wasn't until after such time that they determined he was an illegal alien that they sought to arrest him and only because he had no ties and was likely to abscond. Now, Mr. Haffer has had more than sufficient time should he wish to have got this matter to a head in the United States District court prior to waiting here for the immigration hearing. Now, the Service has not pressed, to date, for any no-work rider on his bond. But should Mr. Haffer, counsel for the respondent, seek any redress in the United States District Court and, ostensibly, on appeal to the U.S. Court of Appeals, and from his statements, ostensibly even higher, then we're faced with a situation of an illegal alien remaining, living, working and remaining in the United States during all this time and I think we've got to take into consideration it would be the better part of a year or eighteen months before this would be even — arguments would be heard. And there's just no real justification or basis not to proceed with the Order to Show Cause, Your Honor. Now, he has auxiliary rights, then, ostensibly this could be reversed. But it's still not going to change the basic fact we're faced with an alien who's

illegally in the United States and does not have any valid basis to remain in the United States, no immigrant visa, and he doesn't even have an entry as a visitor.

MR. HAFFER: May I respond?

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: I find this somewhat difficult because it appeared the original part of Mr. Leadbetter's response was to the question of the unlawful arrest or unlawful entry. Then he changed to the issue of whether or not we should proceed at this time.

THE IMMIGRATION JUDGE: All I really asked for him to respond to was your request for a continuance.

MR. HAFFER: I understand, but I would like to respond, if I could, to some of the statements he made as to the validity of the argument that the arrest was illegal or legal and the entry was illegal or legal. I don't believe in the judge's decision denying our motion for terminating the proceeding — if there's any decision necessarily made as to the legality or illegality of the arrest, I think the information which you have been reading from in that memo in front of you, which deals with the issues such as a minimal intrusion and the difficulty to get proof in some other way, the rather large significant problem the country has now with undocumented immigrants, certainly would not apply to a case like this. It may well apply to a stop on the street. It may well apply to stops or the functional equivalents at borders, but to say that the minimal intrusion when the Immigration Service comes onto somebody's private property during working hours without the permission of the owner or the supervisor, a foreman or anybody, to call that a minimal intrusion seems to me to be flying totally in the face of the Constitution. It would be a similar minimal intrusion for the police to do the same sort of thing in a criminal case. And I think to try to gloss over the actions of the immigration officers in this case by calling it a minimal intrusion on people's rights is an unjustifiable statement on your part. As far as bringing the matter to the United States District Court prior to coming here, I felt that it was important and I think the District Court would have felt the same way, that it was required that this issue be raised at the adminis-

trative level prior to raising it at the District Court level, which is why we did so. We felt that we had to exhaust our administrative remedies on the issue of the illegal arrest and the illegal entry and we have done that today. And I think that at this point we have a valid claim to attempt to raise this issue now before the United States District Court prior to proceeding on the merits.

MR. LEADBETTER: Your Honor, during the recess, Mr. Elder contacted the Zoning Commission, City of San Mateo, and business premises are zoned commercial, "C," rather than "M," manufacturing, and the commercial zone will be no different than a garage or a gas station. And I think if the Court would take notice of — not of its own knowledge, but from factual knowledge, that in a garage or a filling station one of the basis of doing business is inviting the public at large into the premises for services. And this commercial venture here is no different because it picks up transmissions and repairs them. It has a large open door which apparently allows deliveries of these goods or transmissions and/or the pickup. So there'd be no difference as far as open to the public.

THE IMMIGRATION JUDGE: I don't know why you're making this now, but as long as you've made it, you mean that anybody could have come off the street and walked into and had free run of Mr. Bradley's premises?

MR. LEADBETTER: I'm not sure there'd be free run, Your Honor, because in this particular case I think entering the premises for business or commercial purposes, or in this case entering to see the owner of the business to solicit his cooperation regarding potential law violations —

MR. HAFFER: If they refused this cooperation, then what?

MR. LEADBETTER: The refusal was not as to the officers, per se, but only during that particular time during working — as he said that it's all right to come on during lunch period, but not then. Of course, this took place after they determined that the respondent was an illegal alien.

MR. HAFFER: Your Honor, I think that it is not proper to take judicial notice that anything which is zoned "C" commercial means that every part of every commercial establishment zoned "C" is public. I don't think that the place

in a gas station where the safe is located, nor do I consider the place in a department store where stocks are supplied to be considered public.

THE IMMIGRATION JUDGE: Let's cut this argument short. First of all, Mr. Leadbetter, it is obvious I didn't state my reasons for my statement that I would not hear any further evidence on the issue but would hear an offer of proof, and from my denial of Mr. Haffer's motion. But I'll tell you now that my denial of Mr. Haffer's motion was not because I considered what the officers did lawful. By the same token, it wasn't because I considered it unlawful. I denied the motion because I considered what they did irrelevant. This is a civil proceeding. It has been so held by the United States Supreme Court and the Board of Immigration Appeals and several courts have also held that even if an arrest were improper, it does not affect the issue of deportability, of the propriety of deportation proceedings, which are considered civil in nature. And for that reason I decided that the manner in which the respondent was apprehended had no bearing on this proceeding. So I do not intend to make a finding on the legality or illegality of the search, alleged search and of the arrest. Now, the motion for continuance is denied.

Mr. Haffer, do you wish to plead to the contents of the Order to Show Cause for the respondent?

MR. HAFFER: Yes, Your Honor.

THE IMMIGRATION JUDGE: Will you waive the requirement I read and explain the contents to him at this hearing?

MR. HAFFER: I do.

THE IMMIGRATION JUDGE: How does he plead to the four allegations?

MR. HAFFER: He denies all of the allegations contained therein.

THE IMMIGRATION JUDGE: And he denies deportability?

MR. HAFFER: That is correct. I have also instructed my client, Your Honor, to refuse to answer any questions as relates to the Order to Show Cause on the basis of the Fifth Amendment.

MR. LEADBETTER: Your Honor, at this time the Government moves for a short recess.

THE IMMIGRATION JUDGE: Five minutes.

MR. LEADBETTER: Thank you, Your Honor.

THE IMMIGRATION JUDGE: The hearing is resumed. Are you ready to proceed, Mr. Leadbetter?

MR. LEADBETTER: I am, Your Honor.

THE IMMIGRATION JUDGE: Please do so.

MR. LEADBETTER: At this time the Government would like to recall to the witness stand Investigator Eddy. Let the record show that Mr. Eddy is in the courtroom.

THE IMMIGRATION JUDGE: Yes, and he is on the witness stand.

Proceed.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you an I-213, Record of Deportable Alien, and a signature. Is that your signature, sir?

A Yes, it is.

Q Is that an official document made in your official capacity as an investigator?

A Yes, it is.

Q Does it pertain to the respondent, one Adan Lopez-Mendoza?

A Yes, it does.

MR. LEADBETTER: The Government will offer this into the record. It has been shown to counsel for the respondent.

THE IMMIGRATION JUDGE: Is there any objection, Mr. Haffer?

MR. HAFFER: I have no objection, Your Honor.

THE IMMIGRATION JUDGE: The I-213 is entered in evidence as *EXHIBIT 2*.

Proceed.

MR. LEADBETTER: Thank you, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you an affidavit, Form 215B, two pages, Record of Sworn Statement, with a signature on the second page. Is that your signature, sir?

A Yes, it is.

Q Did you take this affidavit in conjunction with your official duties regarding the respondent on August 3, 1976?

A Yes, I did.

MR. LEADBETTER: The Government, Your Honor, introduces it into the record. Copy has been shown to counsel for the respondent.

THE IMMIGRATION JUDGE: Is there any objection, Mr. Haffer?

MR. HAFFER: Let me just find out something. Are you going to submit anything else?

MR. LEADBETTER: At this time, that's all. No. I'm going to submit one other thing.

MR. HAFFER: I have no objection to the admission of the I-215.

THE IMMIGRATION JUDGE: It is entered in evidence as *EXHIBIT 3*.

Do you have anything else, Mr. Leadbetter?

MR. LEADBETTER: Yes. I have one other document, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you a Form G-123 Worksheet for Oral Report. Have you ever seen this report?

A Yes, I have.

Q Is that the worksheet that was the basis of your going to San Mateo to check the authenticity of this information as to alleged illegal aliens being on the premises?

A Yes, it is.

MR. HAFFER: Mr. Leadbetter, could I possibly have a copy of that before I leave today? Is that possible? If it is being submitted into evidence, I think it would be appropriate.

MR. LEADBETTER: I don't see any reason why not.

At this time, Your Honor, the Government wishes to introduce that into the record.

THE IMMIGRATION JUDGE: Is there any objection to this, Mr. Haffer?

MR. HAFFER: No objection whatsoever. I'd like to be able to make a copy of that before we leave today.

THE IMMIGRATION JUDGE: Why are you offering this Worksheet for Oral Report, Mr. Leadbetter?

MR. LEADBETTER: Just for the sake of the record, Your Honor.

THE IMMIGRATION JUDGE: What do you mean? What does that mean, "for the sake of the record"?

MR. LEADBETTER: The — undoubtedly, Your Honor, there'd be an appeal and in — it'd be for the sake of the whole record.

THE IMMIGRATION JUDGE: How does this help the record?

MR. LEADBETTER: It does indicate —

THE IMMIGRATION JUDGE: It seems to me, if you're going to offer it, you should have offered it this morning when Mr. Eddy was testifying, because this doesn't go to the issue of deportability.

MR. LEADBETTER: No, it doesn't.

THE IMMIGRATION JUDGE: That's all I am taking evidence on.

MR. LEADBETTER: The Government at this time withdraws it.

MR. HAFFER: Your Honor, I would request we have it in evidence at this time. This is the G-123, is it not, that Mr. Eddy mentioned before? And I asked for it at the time, as a matter of fact.

THE IMMIGRATION JUDGE: I will enter it in evidence as *EXHIBIT C*.

MR. HAFFER: For the respondent?

THE IMMIGRATION JUDGE: Just Exhibit C. I have entered the two photographs as Exhibits A and B, and this is Exhibit C. The reason I've used letters for those is that those refer to the issue of the search.

MR. HAFFER: All right, as does this.

THE IMMIGRATION JUDGE: And I have used numbers for exhibits relating to the issue of deportability.

Do you have anything else on the issue of deportability, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: Do you want to question Mr. Eddy?

MR. HAFFER: I have no questions.

THE IMMIGRATION JUDGE:

Q Mr. Eddy, just a few things. This Form I-213, which you identified and which I have entered in evidence as Ex-

hibit 2, contains a lot of information. Where did you get the information recorded on it?

A Through direct interview with Mr. Lopez.

Q Did you type this yourself?

A Yes, I did.

Q Is that your signature on the bottom?

A Yes, it is.

Q Where did the interview take place?

A Well, I anticipated some problems with this case, so part of the interview took place in the vehicle outside Transco Transmission down in San Mateo. The rest of the interview took place in Room 1132, 630 Sansome Street.

Q In your office?

A Right.

Q Where did you prepare the document?

A The document was prepared here.

Q Just to repeat, is all the information in the document about the respondent's alienage and manner of entry information that was furnished to you by him?

A That is correct. At the time I initially interviewed him, I wrote down the answers to several questions on the back of the G-123. I can't recall whether or not I changed that information after we returned to the Service office. But it's basically —

THE IMMIGRATION JUDGE: Are there any other questions of Mr. Eddy, Mr. Haffer?

MR. HAFFER: No, Your Honor.

THE IMMIGRATION JUDGE: Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Eddy.

Mr. Haffer, does the respondent wish to offer any evidence on the issue of deportability?

MR. HAFFER: No, Your Honor, we don't. As I indicated previously, I have consulted with Mr. Lopez and he is not to respond to any questions on the issue of his deportability on the basis of the Fifth Amendment. However, if he should be found deportable, we would, obviously, like to request voluntary departure in lieu of deportation.

THE IMMIGRATION JUDGE: We'll get to that. Of course, you have made a statement that you have instructed him to refuse to testify on the basis of the Fifth Amendment. He hasn't been asked to testify.

MR. HAFFER: Pardon me?

THE IMMIGRATION JUDGE: He hasn't been asked to testify.

MR. HAFFER: No, he hasn't.

MR. LEADBETTER: Your Honor, the Government would, if it's other than the fact apparently it's going to be a nullity if Mr. Haffer won't allow him to testify, the Government would call him.

THE IMMIGRATION JUDGE: The Fifth Amendment is a personal privilege, Mr. Leadbetter.

MR. LEADBETTER: All right. The Government would call him, Your honor.

THE IMMIGRATION JUDGE: Mr. Lopez, come up on the witness stand.

Q Remain standing and raise your right hand to be sworn.

MR. HAFFER: He's already been sworn.

THE IMMIGRATION JUDGE: Proceed, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Would you state your complete and full name, sir.

MR. HAFFER: Your Honor, he's refusing to answer, I believe.

THE IMMIGRATION JUDGE: He is just sitting silently. You may instruct him if you wish, Mr. Haffer.

MR. HAFFER: Will it be translated what I instruct him?

THE IMMIGRATION JUDGE: Yes. Make a statement for the record and the interpreter will translate it.

MR. HAFFER: I advise my client not to answer the question on the basis that it would be incriminatory.

THE IMMIGRATION JUDGE (to interpreter): Translate that for him.

Q Mr. Lopez, your attorney has instructed you not to answer the question on the ground that it would tend to incriminate you. Do you wish to follow his instruction or do

you wish to answer the question? Do you wish to answer the question or will you accept his advice?

A I want to follow his instructions.

Q Then do you refuse to answer the question?

A Yes. I refuse to answer the question.

Q Will you refuse to answer any other questions that the trial attorney asks you for the same reason?

A Yes.

THE IMMIGRATION JUDGE: Obviously, there is no useful purpose in questioning him any further, Mr. Leadbetter.

MR. LEADBETTER: Yes, Your Honor.

THE IMMIGRATION JUDGE: Will you stipulate the country to which he wishes to be sent if he is to be deported, Mr. Haffer?

MR. HAFFER: Yes, Your Honor. Mexico.

THE IMMIGRATION JUDGE: Now, you said he wants to apply for voluntary departure.

MR. HAFFER: Yes, Your Honor. Although, we still will raise this issue on appeal. I think if he is found deportable, he doesn't have any previous immigration violation record, that I know of, or that the Service knows of, and he has not been receiving welfare, so I would request a period of thirty days voluntary departure.

THE IMMIGRATION JUDGE: Do you want to question him on the issue of voluntary departure, Mr. Haffer?

MR. HAFFER: Your Honor, I will ask him a few questions that deal directly with the issue of his eligibility for voluntary departure, if I may. If I may also, I'd like to have the translator inform the respondent that I am now advising him to answer the following questions that I'm going to pose to him on the issue of voluntary departure.

THE IMMIGRATION JUDGE (to interpreter): Miss Miranda, inform — Miss Miranda is the official interpreter in the Spanish language, of the Service. And the respondent will testify through her as he did prior, thus far. Instruct him that his attorney has said he should now answer the questions that he will ask him.

Go ahead, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Lopez, have you previously been deported from the United States?

A No.

Q Have you ever been convicted of any crime?

A Never.

Q Have you ever received any public assistance or welfare benefits?

A Never.

Q Are you in possession of sufficient funds to pay for your trip, return trip to Mexico?

A Yes.

Q And if you were given a period of thirty days within which to depart the United States instead of being deported, would you then depart within those thirty days?

A Yes.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have any questions, Mr. Leadbetter?

MR. LEADBETTER: Yes.

BY MR. LEADBETTER:

Q How did you enter the United States in October —

MR. HAFFER: Your Honor, I would at this point again instruct my client to refuse to answer any questions that deal — that relate to the charge of deportability.

THE IMMIGRATION JUDGE: Mr. Haffer, in order to qualify for voluntary departure, the respondent has the burden of proof and he must answer questions freely. But any answer that he gives in connection with the application for voluntary departure may not be used against him on the issue of deportability.

MR. HAFFER: I honestly don't see, Your Honor, what the relevance is of how he entered the United States as to the question of voluntary departure.

THE IMMIGRATION JUDGE: It certainly has relevance.

MR. HAFFER: If he is found deportable under the charge contained in the Order to Show Cause, the deportation charge is "entered without inspection."

THE IMMIGRATION JUDGE: Why do you need that answer, Mr. Leadbetter.

MR. LEADBETTER: Your Honor, certainly the respondent should not be allowed in a civil proceeding to use the Fifth Amendment as a sword when it is intended as a shield. Anything relevant — this is a matter of discretion from the Attorney General through the immigration judge as to whether —

THE IMMIGRATION JUDGE: Don't you think the Service has established that he is deportable as an alien who entered without inspection?

MR. LEADBETTER: That's true, Your Honor, but these questions put forth could lead to avenues of other matters as to his fitness to be granted the privilege of voluntary departure. It is not something that is automatically granted. Because he can state that he has not been arrested and has sufficient funds to return to Mexico, it's more than that. It's a discretionary grant for the respondent.

THE IMMIGRATION JUDGE: Just a second. Mr. Haffer, are you still instructing him not to answer?

MR. HAFFER: I made an objection. Was my objection overruled to that question?

THE IMMIGRATION JUDGE: About its relevance?

MR. HAFFER: I mean the objection to the relevance.

THE IMMIGRATION JUDGE: The objection is overruled.

Q There is a question before you, Mr. Lopez. How did you enter the United States?

MR. HAFFER: Your Honor, based on your representations to us that the answers to questions as they relate to the issue of his eligibility for voluntary departure will not be used and cannot be used in the issue — binding on the issue of deportability, I will instruct my client to answer questions. However, I will retain the right to object to individual questions.

THE IMMIGRATION JUDGE: Of course, my statement — I've always felt that way, long before the regulation so provided. But 8 CFR 242.17 so provides.

MR. HAFFER: I would like to add we will not sit here idly and allow the question of voluntary departure to become a full-fledged deportation hearing, which is what I am afraid may happen.

THE IMMIGRATION JUDGE: You can object to any question you wish.

MR. HAFFER: Okay. (To interpreter) You may instruct Mr. Lopez to respond to any questions which I do not object to.

BY MR. LEADBETTER:

Q Your entry into the United States, sir, in October 1975, near San Ysidro, how did you enter the United States?

A Walking.

Q Did you come by yourself or did you use the services of a smuggler or a coyote?

MR. HAFFER: Your Honor, I object to that question. The information contained in the documents already submitted by the Government, a statement by him under oath, as well as statements by Mr. Eddy, is that no smuggling was involved. I don't see the relevance of raising this point at this time.

THE IMMIGRATION JUDGE: There is such a statement in the I-213. The objection is sustained.

BY MR. LEADBETTER:

Q How many times have you been in the United States prior to this occasion, sir?

A This is the first time.

Q What was your intention in coming to the United States?

A To give my wife a better living condition.

Q How do you mean, better living conditions?

A By sending her money so she can live better.

Q How much do you send her?

A It varies. Sometimes fifty, sixty, one hundred.

Q How many children do you have in Mexico, sir?

A One.

Q Have you ever been arrested in Mexico?

A Never.

Q Never in the United States?

A No.

Q When you entered the United States in October of 1975, did you go to work immediately?

A No.

Q When did you go to work?

A Approximately in November.

Q November of 1975?

A Yes.

Q Did you file federal income taxes or state income taxes for the year 1975?

A No.

Q Why not?

A Because it was too soon.

Q What do you mean, too soon?

A I did not know about it.

MR. HAFFER: Your Honor, I think we should ask one question here of whether it was possible he earned enough money to have him required to file income taxes.

THE IMMIGRATION JUDGE: He only claims to have been here at most three months.

MR. HAFFER: Actually, it was November he started working. So it was two — more or less at two dollars an hour, which is what it says.

MR. LEADBETTER: Nothing's been brought out, Your Honor. He says he didn't know about it. Rather than get into that, since he stated he didn't know about it, but, in fact, did not want to file either federal or state income tax, I think the Court should take into its notice that, in effect, by not filing if he earned sufficient income, and that's a violation of the law.

MR. HAFFER: How could you possibly raise that point? If he is not required to file, what difference does that make whether he filed it or not if he's not required to file.

THE IMMIGRATION JUDGE: Let's ask him this question.

Q During the year 1976, Mr. Lopez, have you worked steadily?

A Yes.

Q Has money been withheld from your wages for federal and state income tax purposes?

A Yes.

THE IMMIGRATION JUDGE: Does that satisfy you, Mr. Leadbetter?

MR. LEADBETTER: The issue is 1975. He doesn't have to file his federal income tax for 1976 until 19 —

THE IMMIGRATION JUDGE: Mr. Leadbetter, the man was here less than three months in 1975.

MR. LEADBETTER: Well, then, the burden is still on him to show he didn't earn sufficient income. The Government is charging that by his statement that he didn't know about the income tax, he didn't know it. So even if he did, it's —

THE IMMIGRATION JUDGE: What is your point?

MR. LEADBETTER: The point is, the fact he has not filed an income tax is a violation of federal law and is something to be considered by the Court as to whether he'd be granted voluntary departure or not.

THE IMMIGRATION JUDGE: Of course, whether he has complied with the Internal Revenue Code is important, but I must laugh to myself that you are asking this man this question. You have participated in hundreds of hearings involving voluntary departure issues and this is the first time you have ever asked that question. But you are just dragging this out unnecessarily.

Q Mr. Lopez, was your first employer the same employer for which you are now working?

A Yes.

Q Then, when did you go to work for him?

A It was around the 15th of the month, but I don't know exactly, but it was in November.

Q Was that your first job in the United States?

A Yes.

Q From that time on, did your employer withhold money from your wages for state and federal income taxes?

A Yes.

Q Do you happen to know how much you earned during the year 1975 in the United States?

A No. I do not know exactly.

Q At the end of the year, or before April 15th, 1976, did you consult anybody about whether you were entitled to a refund of the money that had been withheld from your wages for your 1975 earnings?

A No.

THE IMMIGRATION JUDGE: Are you satisfied, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are still not satisfied about the income tax?

MR. LEADBETTER: The issue, of course, is how many exemptions did he claim as far as that goes. If he claimed three or four exemptions, they wouldn't withhold anything.

MR. HAFFER: Excuse me, Your Honor. The question is very simply how much did he earn an hour for those six weeks that he worked in the United States in 1975.

THE IMMIGRATION JUDGE: Mr. Leadbetter, inasmuch as you are so concerned about income tax, do you know what he had to earn in order to be required to file a return?

MR. LEADBETTER: I believe it's \$750.

MR. HAFFER: Wrong. That's wrong.

MR. LEADBETTER: If he only had this one job, if this was the only place he worked, Your Honor.

THE IMMIGRATION JUDGE: I don't think that's right, Mr. Leadbetter.

MR. HAFFER: I think it's quite a bit more than that. I think it's \$1,250, \$1,500. Actually, he was being paid \$2.50 an hour at that time and for six weeks that's 240 hours, that comes to approximately \$700 income in 1975.

MR. LEADBETTER: We don't know that, Counsel. He could have held down more than one job.

MR. HAFFER: Why don't you just ask him. He said he worked for only one —

THE IMMIGRATION JUDGE: Come, Mr. Leadbetter. You are making a real mountain out of a real molehill.

MR. LEADBETTER: I don't believe so, Your Honor.

THE IMMIGRATION JUDGE: I am not going to allow anymore questions on that. Let's get on with this. I've heard enough of this case today anyhow.

MR. LEADBETTER:

Q Did you ever apply in Mexico, Mr. Lopez, to enter the United States?

A Never.

Q Did you ever apply for a — just a visitor's authorization, rather than an immigrant visa to come into the United States?

MR. HAFFER: That's been asked and answered, Your Honor. He already said he never applied for a visa.

THE IMMIGRATION JUDGE: I don't think anymore questions on the issue of voluntary departure are in order, unless you have something really bearing on the issue, Mr. Leadbetter. Do you have anything really pertinent?

MR. LEADBETTER:

A Are you working now, sir?

A Yes.

Q For the same employer?

A Yes.

Q Did you — strike that.

MR. LEADBETTER: Nothing further, Your Honor.

THE IMMIGRATION JUDGE: Do you have anything further on the issue of voluntary departure, Mr. Haffer?

MR. HAFFER: I think we've had enough.

MR. LEADBETTER: I'm going to object to that comment by counsel that, "I think we've had enough," Your Honor. I don't think that's called for at all.

THE IMMIGRATION JUDGE: I think we've had enough too.

MR. LEADBETTER: I object to it.

THE IMMIGRATION JUDGE: So you have objected.

Is there anything else you want to present, Mr. Haffer?

MR. HAFFER: No, Your Honor. Only, I think both by the answers to my questions and to Mr. Leadbetter's questions, he certainly — he is eligible and deserves the grant of voluntary departure in lieu of deportation.

MR. LEADBETTER: I think if the Court would check into the matter of *Pimentel*, that's 12 I. & N., page 50, there's a matter of similar circumstances. But even as far as factual situations, almost as benign in this particular case, it was denied, just as a matter of discretion because, in effect, the alien had nothing going for him. In this particular case, we're faced with an illegal alien here in the United States working in the United States with impunity in the United States, admitting that he had not filed or

even heard of United States federal tax laws or the state tax laws, now seeking the grant of the Court on something that is discretionary from the Attorney General.

THE IMMIGRATION JUDGE: It is too late for me to give a decision now.

So the hearing is closed and I reserve decision.

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I hereby certify that to the best of my ability and belief the foregoing pages numbered 1 through 102 are a complete and accurate transcript of the above hearing.

/s/ MARY L. MOYNIHAN

Mary L. Moynihan
Closed Microphone Reporter
February 7, 1977

[Exhibit 1]

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A 22 452 208

In the Matter of Adan LOPEZ-Mendoza Respondent.
In Service Custody
San Francisco, California

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States near San Ysidro, California on or about October 1975;
4. You were not then inspected by an immigration officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241 (a) (2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Room 1032 - 630 Sansome Street - San Francisco, California 94111 on August 10, 1976 at 10:00 AM, and show cause why you should not be deported from the United States on the charge (s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

/s/ Charles E. Hoffman
Assistant District Director
for Investigation.
San Francisco, California 94111

Dated: August 3, 1976

CC: Douglas P. Haffer, Esq.
534 Pacific Avenue
San Francisco, Ca. 94133

NOTICE TO RESPONDENT

**ANY STATEMENT YOU MAKE MAY BE USED
AGAINST YOU IN DEPORTATION PROCEEDINGS**

**THE COPY OF THIS ORDER SERVED UPON YOU IS
EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION
PROCEEDINGS, THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES**

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

- ☐ Detained in the custody of this Service.
- ☐ Released on recognizance.
- ☒ Released under bond in the amount of \$2,000.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

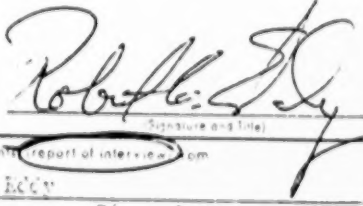
(date)

CERTIFICATE OF SERVICE

Served by me at San Francisco, Ca. on August 3, 1976 at 4:05 p.m.

/s/ R. C. Eddy

(signature and title of employee or officer)

United States Address (Residence) (Number) (Street) (City) (State)		67 115 Labor	
784 4th Ave., San Bruno, CA		None Visible	
Date, Place, Time, Manner of Last Entry		Passenger Boarded At:	
10/75, near SFO, CA		None	
Number, Street, City, Province (State) and Country of Permanent Residence		AR Form (Type & No.)	
Don Con Aguaje, unade A uilillo, Mich., Mexico		<input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced	
Birthdate	Date of Action	Location Code	
4/18/51	8/2/76	SFR	
City, Province (State) and Country of Birth	<input type="checkbox"/> Lifted <input type="checkbox"/> Not Lifted		
Guadalupe, Aguililla, Mich., Mexico	<input type="checkbox"/> Lifted <input type="checkbox"/> Not Lifted		
Visa Issued At	Social Security Account Name		
	None		
Date Visa Issued	Social Security No.	Send C.O. Rec. Check To	
	None	SFR	
Immigration Record	Criminal Record		
Claims none	Claims none		
Name, Address, and Nationality of Spouse (Maiden Name, if appropriate)		Number & Nationality of Minor Children	
Guadalupe ICAVY, Line 5, Mexico		1 Mexico	
Father's Name, and Nationality, and Address, if Known		Mother's Present and Maiden Names, Nationality, and Address, if Known	
Eladio ICAVY, Line 5, Mexico		Guadalupe ICAVY, deceased, Mexico	
Monies Due/Property in U.S. Not in Immediate Possession	Fingerprints	Lookout Book Checked	Departation Charges (Code Words)
<input checked="" type="checkbox"/> None Claimed <input type="checkbox"/> See Form 1-43	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	I-120	1-120
Name and Address of Host (Current U.S. Employer)		From To	
Transco, 221 First Ave., San Mateo, CA 2.00/hr WFI		11/75 Present	
Narrative (Outline particulars under which alien located/apprehended. Include details, not shown above, re time, place, manner of last entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)			
SUBJECT encountered at above place of employment on the basis of telephonic information from on GLEIA GUTIERREZ, 335 White Street, San Francisco, 874-7347.			
SUBJECT last entered the United States near San Ysidro, California during the last days of October 1975, without being inspected by an Immigration Officer.			
SUBJECT is being represented by DONALD LAWLER, Attorney at Law.			
SUBJECT admits alienage and deportability. He was not smuggled into the US, and he is not receiving welfare.			
(If space insufficient, show "continued" and continue on reverse, from bottom up)		Signature and Title 	
DISTRIBUTION:		Received (subject and document) report of interview from	
1 File		Officer: Robert C. Remy	
1 Log		6/3/1976 at 2:30 PM	
		Disposition: 300/133	
		(Receiving Officer): Remy	

[Exhibit 3]
AFFIDAVIT

IN RE: LOPEZ-Mendoza, Adan

FILE NO. _____

EXECUTED AT 511 1st Ave., San Mateo, Ca

DATE _____

Before the following officer of the U.S. Immigration and Naturalization Service, Robert C. Eddy, in the Spanish language. Interpreter None used.

I, Adan LOPEZ-Mendoza, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding my immigration status in the United States

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

My true and correct name is Adan Lopez-Mendoza; I have never used any other names. I was born at Guallabo, Mich., Mexico on April 18, 1951, and I am still a citizen of Mexico. I last entered the United States in the last days of October 1975, near Tijuana, B.C., Mexico, without being inspected by an Immigration Officer.

Eladio LOPEZ is my father; he is a citizen of Mexico, and he has never lived in the United States. My mother was Guadalupe MENDOZA, she is now dead, but she was a citizen of Mexico.

I have read (or have had read to me) the foregoing statement, consisting of 2 pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true, and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the correction(s) noted on page(s) 1).

Signature: /s/ Adan Lopez M

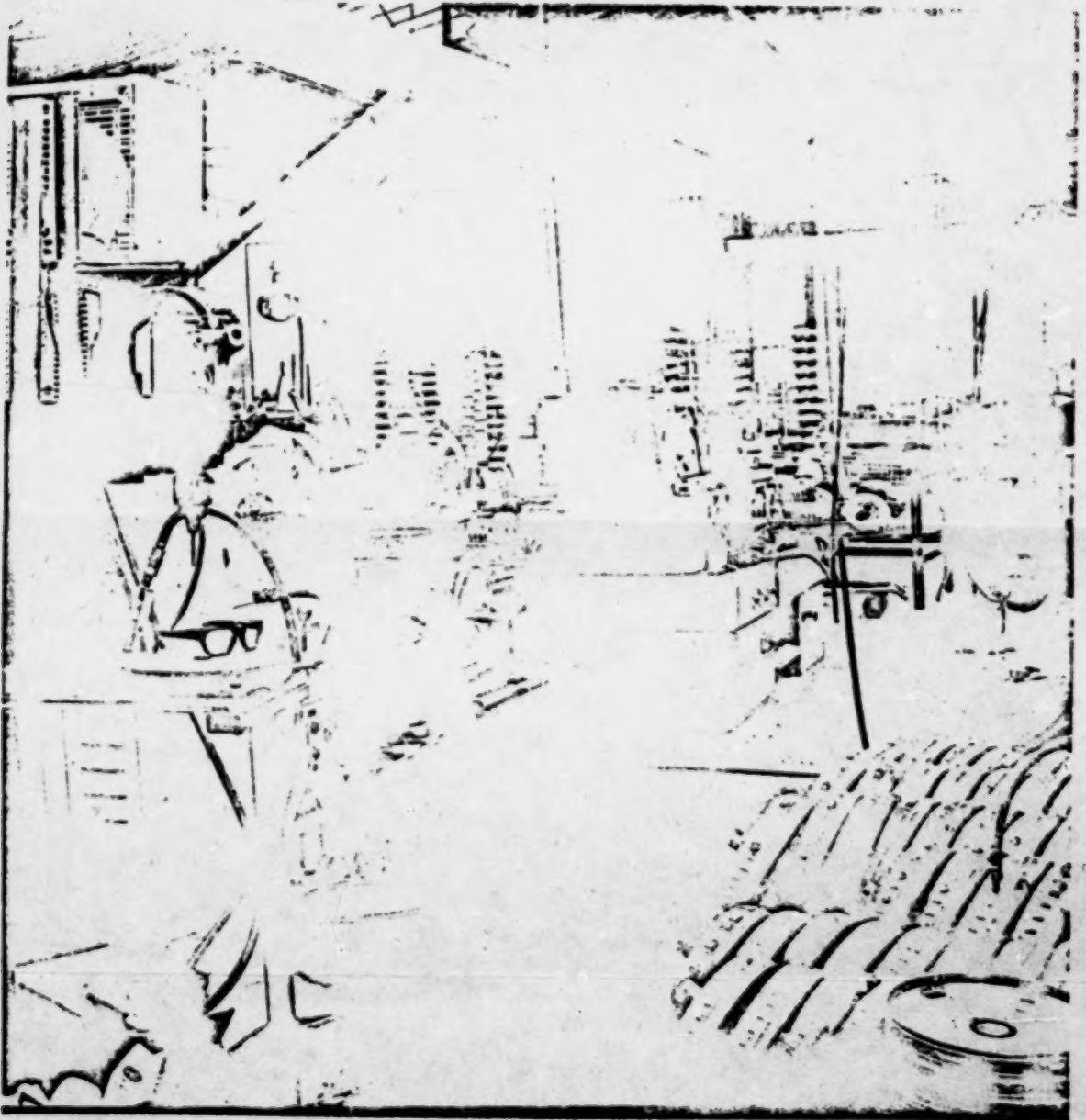
Subscribed and sworn to before me at San Francisco on August 3, 1976

/s/ R. C. Eddy
Officer, United States
Immigration and Naturalization Service

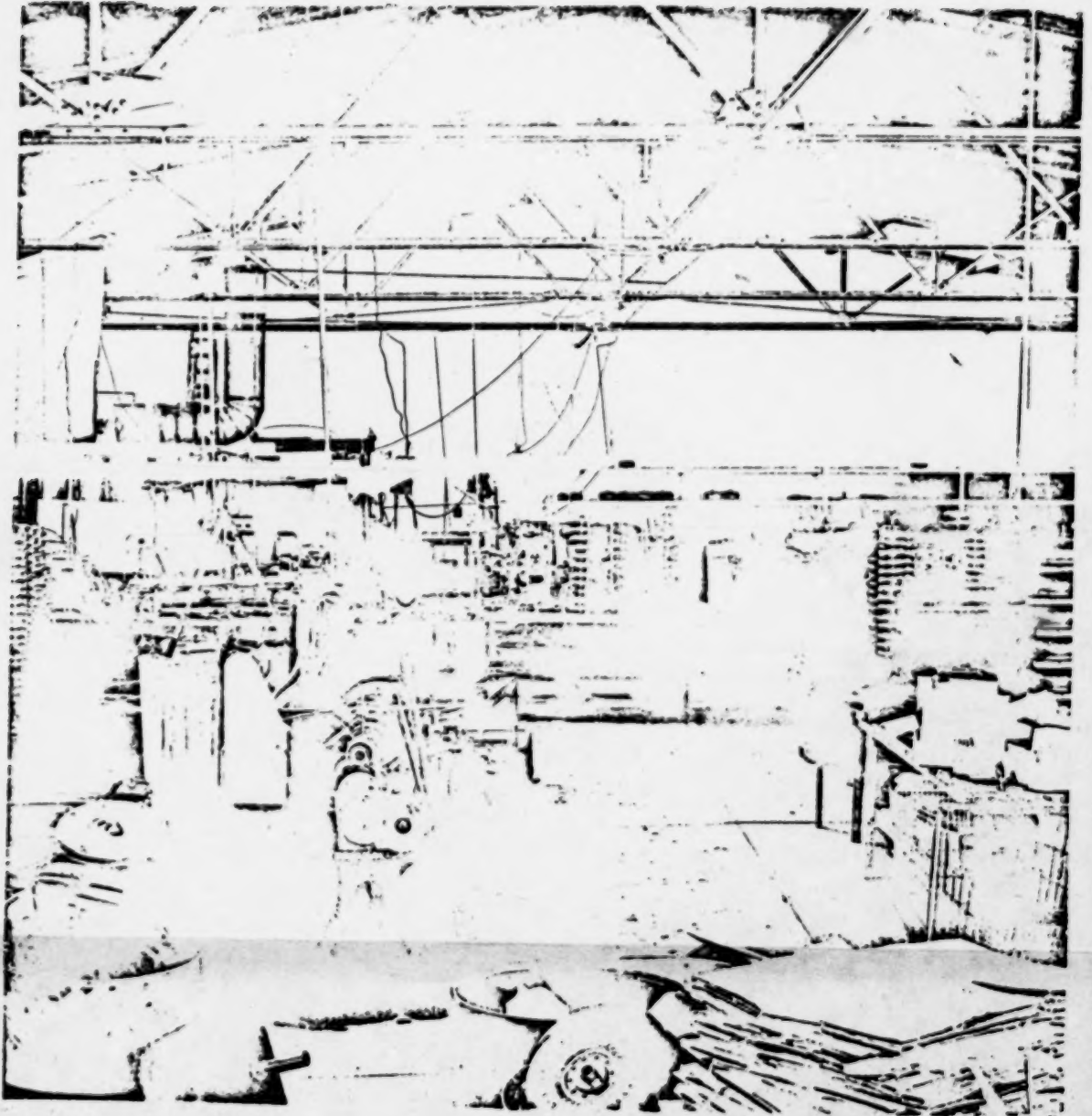
Witnessed by: /s/ R.C.Smart, IMV

RECORD OF SWORN STATEMENT

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Form I-263A (Rev. 11-20-63)



10-8-76 *AK* A 33



13 139
10-8-76

WORK SHEET FOR ORAL REPORT

(11)

3/5/77
B-7

TE: July 6, 76

EMPLOYEE: J. J. J. J. J.

NAME: Guadalupe Aguilar, Jose Aguilar ALIASES: ~~STEFANOS~~
 PRESENT ADDRESS: 41 Oakwood St. SFR (Garage) Spu
 EMPLOYMENT AND ADDRESS: 511 South 1st San Mateo Ca.
 AGE OR BIRTH DATE: 24-30 NATIONALITY: Mexicans

DESCRIPTION: _____
 (Height) (Weight) (Build) (Other - Glasses, Mustache, Scars, etc.)

ENTRY DATA: Date: _____ Place: _____ Manner: illegal

ADDITIONAL INFORMATION: 7 Illegals Residing Together.

- 1.) Jose Luis Mora
- 2.) Eladio Mora
- 3.) Baltiazar Chavez - Making False green cards
- 4.) Baltiazar Mora
- 5.) Ramon Lopez

Selling Green cards For \$50.00

SOURCE: Gloria Gutierrez 333 Elsie St. SFR 824-7327
 (Address) (Tel. No.)

ASSIGNED TO: _____

Index _____

DATE: _____

ALPHA _____

I-53 _____

BY: _____

Date: _____ Searcher _____

Form G-123
(Rev. 11-5-64)

8/02/76 No Such Address in
San Mateo

APR 16-17
admitted

10-8-76 140
me

MURKIN - 11/11/76, 11:11
 Morris

8/02/76 9 A.M

Interviewed Art

"Bradley" owner of

Drammer, 511 E. 1st Ave.

He threatened Investigator
 Robert Eddy with
 these words "The
 next time you come
 here you are going
 to lose your ass"

United States of America

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

May 9

19 80

CERTIFICATION

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103
a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and
Nationality Act, of 1952, as amended.

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the
records of the said Immigration and Naturalization Service, Department of Justice, relating to

ELIAS SANDOVAL SANCHEZ

No. A22 346 925, of which the Attorney General
is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.


James B. Turnage, Jr.
JAMES B. TURNAGE, JR.
District Director

Immigration and Naturalization Service

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIAS SANDOVAL SANCHEZ, (A22 346 925)
PETITIONER

vs.

IMMIGRATION & NATURALIZATION SERVICE
RESPONDENT

NO. 80-7189

PETITION FOR REVIEW

Petitioner ELIAS SANDOVAL hereby petitions for review of the decision of the Immigration Judge dated October 7, 1977, and of the decision and order of the Board of Immigration Appeals, United States Department of Justice, dated Feburary 21, 1980, dismissing petitioner's appeal to the said Board from order of deportation.

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Petitioner
1207 Geo. Wash. Way
Richland, WA 99352
(509) 943-4661

CERTIFICATE OF SERVICE

I, Charles H. Barr, attorney for Petition[er], hereby certify, that a copy of the foregoing petition was mailed postage prepaid to those shown on the attached list, this 10th day of April, 1980.

/s/ Charles H. Barr

CHARLES H. BARR

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

MEMORANDUM

A22 346 925

Date: April 7, 1980

To : Chairman
Board of Immigration Appeals
5203 Leesburg Pike, Suite 1609
Falls Church, VA 22041

FROM : James B. Turnage, Jr., District Director
Seattle, Washington

SUBJECT : Elias, SANDOVAL-Sanches, A22 346 95
Motion To Re-open

The Respondent's appeal to the Board was dismissed on February 2, 1980, and he was given 30 days voluntary departure by the Board, until March 21, 1980.

The Respondent's Motion to Reopen, dated March 10, 1980, was received by the Service on March 24, 1980. The Service is opposing the motion because it restates the issues raised on appeal, does not comply with 8 CFR 3.2, and appears to be a delaying tactic, as set forth in our form G-29 memorandum dated April 3, 1980.

Therefore, the Service does not intend to stay deportation during the pendency of this motion, and will proceed with deportation notwithstanding the motion. A warrant of deportation will be prepared within the next few days, and the Respondent will subsequently be served with a surrender demand (Form G-166).

/s/ James B. Turnage, Jr.

UNITED STATES GOVERNMENT

MEMORANDUM

A22 346 925

Date: April 3, 1980

To : Immigration Judge

FROM : Trial Attorney

SUBJECT : Elias SANDOVAL-Sanches, A22 346 95
SERVICE OPPOSITION TO MOTION
TO RE-OPEN

☐ The Service does not desire to appeal the decision of the LJ.

☐ The Service ☐ does ☐ does not desire to file a brief in opposition to the appeal.

☒ The Service ☒ does ☐ does not oppose the motion for reconsideration or reopening.

☐ The Service ☐ does ☐ does not oppose the alien's application for discretionary relief.

☐ The Service requests an extension of _____ days to prepare its brief.

☐ Granted ☐ Denied

Date

LJ

☒ 1. Counsel is mistaken regarding jurisdiction. The Board now has the jurisdiction to re-open, if justified.

2. Counsel is raising the same points in his motion to re-open that he raised in his appeal to the Board on 10-19-77. The Board dismissed the appeal on 2-21-80. The motion therefore does not comply with 8 CFR 3.2

3. It appears that Counsel is seeking further delay in this matter which has already been pending since 6-24-77. It is urged that the motion be denied.

cc: Charles H. Barr, Esq.
1207 Geo. Washington Way
P.O. Box 2733
Tri-Cities, WA 99302

CERTIFICATE OF SERVICE. The undersigned certifies that he mailed a copy of this memorandum to Respondent or his attorney of record on APR 4, 1980.

FORM -G29

/s/ Kendall Warren
Trial Attorney

CHARLES H. BARR
Attorney at Law
1207 Geo. Wash. Way (Richland)
Wash. 99352
Telephone (509) 943-4661

March 10, 1980

District Director
U.S. Immigration and Naturalization
Service
815 Airport Way, South
Seattle, WA 98134

Re: Elias Sandoval-Sanchez
No. A 22 346 925

Dear Sir:

I enclosed in duplicate Motion and Affidavit for re-opening and my check for the re-opening fee in the amount of \$25.00 pursuant to 8 CFR 103.7.

Sincerely yours,

/s/ Charles H. Barr

CHARLES H. BARR
Attorney at Law
CHB/imp
Encls.

cc: Ken Warren

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Matter of:
ELIAS SANDOVAL-SANCHEZ
RESPONDENT
(A-22 346 925)

MOTION TO RE-OPEN

Before the Immigration Judge, The Honorable Newton T. Jones

Comes now the Respondent, Elias Sandoval-Sanchez by and through his undersigned attorney and hereby moves the Immigration Judge to re-open the deportation proceedings herein, this matter having ceased to be within the jurisdiction of the Board of Immigration Appeals by virtue of its decision of February 21, 1980 denying Respondent's Appeal. This Motion is based upon the annexed Affidavits and the decision in *United States vs. Calderon-Medina*, 591 F.2d 529 (9th Circuit 1979), and *Jose Madrigal-Torres vs. Immigration Service*, 9th Circuit No. 78-2182, dated 8/13/79, and upon the decision of the Board of Immigration Appeals in re Reyes Lopez-Mendoza No. A22 734 975 of July 25, 1979. The referenced cases were all decided subsequent to the instant Respondent's appeal and relate to the matters alleged in the annexed Affidavits.

/s/ Charles H. Barr

CHARLES H. BARR

Attorney for Respondent

I certify that a copy of this instrument was mailed postage prepaid this 21st day of MAR, 1980 to Kendell Warren, Trial Attorney for INS

/s/ Charles H. Barr

CHARLES H. BARR

Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Matter of:
ELIAS SANDOVAL-SANCHEZ
RESPONDENT

A-22 346 925
AFFIDAVIT IN SUPPORT OF
MOTION TO RE-OPEN

State of Washington
County of Benton

Elias Sandoval-Sanchez, being first duly sworn on oath deposes and says: I am the Respondent in the above captioned matter. I was arrested by the Immigration and Naturalization Service on June 23, 1977 at the Rogers of Walla Walla potato processing plant near Pasco, Washington. That property is private property. I was arrested without a warrant for my arrest. Following my arrest I was examined by the same officer who arrested me despite the fact, as evidenced by the testimony at the deportation proceeding, that there were other officers readily available to examine me, in violation of 8 CFR 287.3.

When I was arrested without a warrant I was not advised of the reason for my arrest, nor of my right to be represented by counsel of my own choice at no expense to the government, I was not advised of the fact that any statement that I might make could be used against me in a subsequent proceeding, all in violation of 8 CFR 287.3. At no time at or subsequent to my arrest was I ever advised by any officer of the service, as required by 8 CFR 242.2(e), that I could communicate with the consular or diplomatic officers of my country of nationality in the United States. These violations by the Service of its own regulations deprived me of due process and were materially prejudicial to my defense of the subsequent proceedings against me.

The foregoing information was given^e by me in the Spanish language to Charles H. Barr and interpreted back to me

by him from the English language above into Spanish, and I know the contents of the foregoing and they are true and correct.

/s/ Elias Sandoval

ELIAS SANDOVAL-SANCHEZ

Subscribed and sworn to before me this 21st day March, 1980.

/s/ Charles H. Barr

Charles H. Barr, Notary Public in and for the State of Washington residing at Pasco.

I certify that a copy of this instrument was mailed postage prepaid this 21st day of MAR, 1980 to Kendell Warren, Trial Attorney for INS

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Respondent

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

In re: Elias SANDOVAL-Sanchez	DATE JANUARY 18, 1978
	FILE No. A22 346 925

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

NAME	<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
	<input type="checkbox"/> Beneficiary	<input type="checkbox"/>
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)		

NAME	<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
	<input type="checkbox"/> Beneficiary	<input type="checkbox"/>
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)		

Check Applicable Item(s) below:

<input type="checkbox"/> 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia	
	(Name of Court)
	and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law.
<input type="checkbox"/> 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:	
<input type="checkbox"/> 3. I am associated with _____ the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.)	
<input type="checkbox"/> 4. Others (Explain fully.)	
<i>No response removed from file 1-10-78</i>	
SIGNATURE	COMPLETE ADDRESS
NAME (Type or Print) Charles H. Barr, Esquire	TELEPHONE NUMBER

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS:

(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER:

NAME OF PERSON CONSENTING

SIGNATURE OF PERSON CONSENTING

DATE

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

NOTICE OF APPEAL TO THE
BOARD OF IMMIGRATIONS APPEALS

SUBMIT IN TRIPLICATE TO:
IMMIGRATION AND NATURALIZATION SERVICE
815 Airport Way South
Seattle, Washington 98134

In the Matter of: File No. A22 346 925
Elias Sandoval-Sanchez

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated October 7, 1977, in the above entitled case.
2. Briefly, state reasons for this appeal. The Judge erred in admitting Exhibit 3 (form I-213) into evidence in that no proper foundation was laid and because the information placed thereon was obtained involuntarily from Respondent while he was in custody of the Service in actual physically coerced detention in jail without being priorly advised of his full right to counsel, without being afforded an actual opportunity to consult counsel as he requested and without being advised by his right to silence and the full Miranda warnings as required by due process and by the Service's Regulations and without the use of form I-214. Respondent's initial detention and arrest deprived him of due process and was ultra vires the Service's lawful authority and was based upon illegal search and was lacking in probable cause but was invidiously racially discriminatory and therefore suspect. Respondent was arrested without a warrant although there was no likelihood he would flee. The Judge erred in not granting Respondent's Motion to Terminate proceedings because of lack of jurisdiction based on an invalid Order to Show Cause and illegal procedure violative of the fourth amendment tainting the proceedings. Deporting [t]he Respondent would be defacto deportation of his U.S. citizen child born March 18, 1977 at Pasco and would therefore be ultra vires the Service's lawful authority.

3. I do desire oral argument before the Board of Immigration Appeals in Washington, D.C.
4. I am filing a separate written brief or statement. A copy of the transcript of hearing is requested.

An additional period of 30 days from receipt of the transcript in which to file Respondent's brief is requested.

/s/ Charles H. Barr

Charles H. Barr
P.O. Box 2733, Tri-Cities, Wa. 99302

October 17, 1977

Form I-290A
(Rev. 4-1-76)N

IMMIGRATION JUDGE HEARING WORKSHEET AND MEMORANDUM OF DECISION

Place Spokane File No. A-22 346 925 Counsel or Representative Charles H. Barr
 Respondent or Applicant ELIAS SANDOVAL-SANCHEZ Trial Attorney [Signature]
 Address 311 W. Agate, Apt. D, Pasco, WA 99301 Interpreter [Signature] Language Spanish

☒ DEPORTATION HEARING Deportability ☒ Contested ☐ Not Contested
 OSC charge 241(a)(2), entry without inspection ☐ Sustained ☐ Not Sustained
 Lodged [Signature] ☐ Sustained ☐ Not Sustained
 Application [Signature]
 Deportation country: Mexico
 Choice Mexico Directed Or
 243(h) requested as to

☐ EXCLUSION HEARING Application Country of birth
 Grounds: 1. I&N Act Sec. 212(a)() ☐ Excludable ☐ Not Excludable
 2. I&N Act Sec. 212(a)() ☐ Excludable ☐ Not Excludable

☐ BOND PROCEEDINGS Application Decision
 PROCEEDINGS REOPENED ON 7/13/77 IMMIGRATION JUDGE
 On Adjourned to For
 On Adjourned to For
 On Adjourned to For
 COMPLETED ON 7/13/77 IMMIGRATION JUDGE NEWTON T. JONES

DECISION: [Signature] Date: 10-2-77
☐ Oral ☐ Reserved ☒ Written Appeal: ☐ Waived Reserved by ☒ Alien ☐ Trial Attorney
☒ Transcribe ☒ Hearing ☐ Decision Appeal due 10-2-77 10-21-77
☐ Transcript to Attorney ☐ Information copy of oral decision

REMARKS:

Documents To Be Submitted

- ☐ Character affidavits
☐ Character Inv.
☐ Employment Statement
☐ Other

31

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

In re:	DATE
ELIAS SANDOVAL-SANCHEZ	6-28-77
	FILE No.
	A

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

NAME	<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
ELIAS SANDOVAL-SANCHEZ	<input type="checkbox"/> Beneficiary	<input checked="" type="checkbox"/> Respondent
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)		
311 W. Agate, Apt. D PASCO WA. 99301		
NAME	<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
	<input type="checkbox"/> Beneficiary	<input type="checkbox"/>
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)		

Check Applicable Item(s) below:

<input checked="" type="checkbox"/> 1	I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia <u>Washington</u> <u>Supreme</u> and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law.
<input type="checkbox"/> 2	I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:
<input type="checkbox"/> 3	I am associated with _____ the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.)
<input type="checkbox"/> 4	Others (Explain fully.)
SIGNATURE	COMPLETE ADDRESS
	P.O. Box 2733
NAME (Type or Print)	TRI-CITIES, WA. 99302
CHARLES H. BARR	TELEPHONE NUMBER
	(509) 943-4661

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SPOKANE, WASH.

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS: CHARLES H. BARR
(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER: A11

32

NAME OF PERSON CONSENTING	SIGNATURE OF PERSON CONSENTING	DATE
ELIAS SANDOVAL-SANCHEZ		6-28-77

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
MATTER OF ELIAS SANDOVAL-SANCHEZ
Respondent
IN DEPORTATION PROCEEDINGS
File A-22 346 925
TRANSCRIPT OF HEARING

Before: NEWTON T. JONES, Immigration Judge

Date: July 13, 1977

Place: Spokane, Washington

Transcribed by Arlean F. Fay
At Seattle, Washington

Official Interpreter Mrs. Orosia Sada de McHugo

Language Spanish

APPEARANCES:

For the Service:

Kenneth D. Brant
Acting Trial Attorney
Spokane, Washington

For the Respondent:

Charles H. Barr, Esq.
P.O. Box 2733
Tri-Cities, Washington 99302

IMMIGRATION JUDGE: This is Spokane, Washington, July 13, 1977. My name is Newton T. Jones and I am an Immigration Judge. This is a deportation hearing in the case of Elias Sandoval-Sanchez, A22 346 925. Present, in addition to respondent, is Charles H. Barr of P.O. Box 2733, Tri-Cities, Washington 99302, who has entered his appearance as attorney for the respondent. Also present is Kenneth Bryant, Acting Trial Attorney, Spokane, Washington. This hearing is being conducted through the services of—

INTERPRETER: Orosia McHugo.

IMMIGRATION JUDGE: —official Spanish interpreter for the Immigration and Naturalization Service.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q What language do you speak and understand best, sir?

A Spanish.

Q We will then conduct this hearing in the Spanish language. Will you please stand and raise your right hand. Do you solemnly swear the statements you are about to make in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

A Yes.

Q Please be seated. What is your name?

A Elias Sandoval.

IMMIGRATION JUDGE: All right. The Order to Show Cause, Mr. Barr, is marked *Exhibit No. 1*. A copy was served on the respondent on June 24, 1977. Now, Mr. Barr, this Order to Show Cause has four allegations. Are you in a position at this time to plead to any or all of the four allegations contained in the Order to Show Cause?

COUNSEL: May I see the order?

IMMIGRATION JUDGE: Yes. We will go off the record while I give the attorney for the respondent the Order to Show Cause. Off the record. All right, back on the record. All right, Counsel, are you ready to plead to the allegations?

COUNSEL: Yes, your Honor.

IMMIGRATION JUDGE: How do you plead to the four allegations?

COUNSEL: Prior to pleading, your Honor, I would object to the Order to Show Cause. It appears that it has been signed by some one on behalf of Joseph M. Swing. Following that signature there are the initials "RJK," which appear to correspond on the name shown on the reverse, as the person who served the Order to Show Cause, one Robert J., last name illegible, which begins with a "K," after which there appear some initials, which I believe read "PAIC."

IMMIGRATION JUDGE: All right. That stands for Patrol Agent in Charge, Mr. Barr, and the Order to Show Cause I have wasn't signed by anybody but Mr. Swing. It appears "Joseph M. Swing." I think that is his signature.

COUNSEL: The order that I have has been signed twice and the signatures are distinctly different, your Honor. It appears that Mr. Swing's own signature was put on this document sometime after it was served.

IMMIGRATION JUDGE: Well, Counsel, I am working on this document right here, the one I marked Exhibit No. 1. It shows it was signed by Joseph M. Swing. Now, it does show that Mr. Robert J. Keeum (phonetic)—

ACTING TRIAL ATTORNEY: Keim, I believe.

IMMIGRATION JUDGE: —Keim, Patrol Agent in Charge, served it on June 24th.

COUNSEL: Whereas an exhibit in connection with this motion then, your Honor, the copy of the Order to Show Cause which—

IMMIGRATION JUDGE: Marked *Exhibit 2*. Counsel, your motion is denied. Are you ready to proceed with something else?

COUNSEL: In support of that I would note that the regulations authorize District Directors and certain specified Officers in Charge of suboffices, and that would include the Officer in Charge of the Spokane office, would be authorized, but no one else.

IMMIGRATION JUDGE: Mr. Bryant, does the District sometimes authorize Orders to Show Cause telephonically?

ACTING TRIAL ATTORNEY: Yes, they do.

IMMIGRATION JUDGE: All right. Go to something else, Counsel. Your motion is denied.

COUNSEL: Pertaining the objection as a continuing objection.

IMMIGRATION JUDGE: It is a continuing objection.

COUNSEL: We would deny Allegations 1, 2—

IMMIGRATION JUDGE: 3 and 4?

COUNSEL: 1, 2, 4, and the conclusion of deportability, and admit Allegation No. 3, with the clarification that the date of entry was the 4th of June, 1976, and that the manner of entry was on foot.

IMMIGRATION JUDGE: All right, Mr. Bryant, Allegations 1, 3, and 4 have been admitted. Allegations No—pardon me. 1, 2—3 has been admitted. Allegations 1, 2, and 4 denied. Are you ready to proceed?

ACTING TRIAL ATTORNEY: Yes, Judge.

IMMIGRATION JUDGE: Before you do so, let me ask the respondent a question.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q In case it becomes necessary to deport you, to which country do you wish to be deported?

COUNSEL: Your Honor, that will be to Mexico.

IMMIGRATION JUDGE: All right. Mr. Bryant, you may proceed.

ACTING TRIAL ATTORNEY: I would like to present as exhibit "Record of Deportable Alien, Form I-213, in the name Elias Sandoval-Sanchez.

COUNSEL: I object to the admission of Forms I-213 on the grounds that, first of all, there is no foundation and, secondly, that the information obtained thereon was obtained in violation of the defendant's rights, without having been advised of his Miranda rights and when he had, after he had already asked for counsel and had not been afforded an opportunity to communicate with counsel.

IMMIGRATION JUDGE: All right. At this point, Counsel, your objection is overruled. I am going to admit it into the record as an exception hearsay rules since it is in the name of Elias Sandoval-Sanchez and it contains his alien registration number, which is the same as that appearing

on the Order to Show Cause, the name is the same as that appearing on the Order to Show Cause. Your objection is overruled. I am going to mark it *Exhibit No. 2*.

COUNSEL: I further object to the admission on the grounds of hearsay, your Honor.

IMMIGRATION JUDGE: All right. It is an exception to hearsay. It is a document kept in the regular course of business. Is that true, Mr. Bryant?

ACTING TRIAL ATTORNEY: Yes.

COUNSEL: I would like to voir dire Mr. Bryant on that.

IMMIGRATION JUDGE: —voir dire Mr. Bryant on it because if you can voir dire Mr. Bryant, you can voir dire your client if you want to.

COUNSEL: It is his motion and there has been no testimony as to who prepared this and Mr. Bryant is not testifying here. He's the Trial Attorney, and this has to be introduced through the person who made it, not Mr. Bryant.

IMMIGRATION JUDGE: It does not, Counsel. I make an exception to the hearsay. It is a document kept in the regular course of business. Is this true?

ACTING TRIAL ATTORNEY: That is correct.

COUNSEL: Mr. Bryant is not sworn, your Honor. Mr. Bryant is not a witness. Mr. Bryant is the Acting Trial Attorney.

IMMIGRATION JUDGE: Mr. Bryant is the Acting Trial Attorney. I have accepted a document and marked it *Exhibit No. 3*. If you desire to go to something else, you may do so.

ACTING TRIAL ATTORNEY: I would call a witness, Judge.

IMMIGRATION JUDGE: All right. Who do you wish to call?

ACTING TRIAL ATTORNEY: Investigator Michael Bower.

IMMIGRATION JUDGE: All right, you may do so.

IMMIGRATION JUDGE TO WITNESS:

Q All right. Will you please state your name?

A Michael J. Bower.

Q And your address?

A 691 U.S. Courthouse, Spokane, Washington.

Q Do you solemnly swear the statements you are about to make in this hearing will be the truth, the whole truth, and nothing but the truth so help you God?

A I do.

IMMIGRATION JUDGE: Have a seat, please. All right, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Mr. Bower, how long have you been employed by the Immigration Service?

A A little over seven years.

Q And assigned to the Spokane office, how long?

A Three and a half years.

IMMIGRATION JUDGE: Do you wish to see the exhibit, Mr. —

ACTING TRIAL ATTORNEY: May I see the exhibit, No. 3, I believe it is?

IMMIGRATION JUDGE: Yes. Let me initial it down here before I hand it to you. All right, you may continue.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Do you have a recollection of the name Elias Sandoval?

Q Yes, I do.

Q And could you relate when you first encountered the subject?

A I first encountered the subject at Rogers Walla Walla Processing Plant, approximately June 23, 1977.

Q And you were at the plant called Rogers Walla Walla in Pasco, Washington, on official business?

A Yes, I was.

Q And you were at that time accompanied by other officers?

A Yes, I was.

Q And had you made prior arrangements to be at Rogers Walla Walla?

A Yes, I had contacted the personnel manager, obtained his permission to check for illegal aliens at the processing plant.

Q And had you in the course—

COUNSEL: Objection to the statement that he obtained permission from the personnel manager. This is pure hear-

say unless the personnel manager is here to testify that he gave him permission.

IMMIGRATION JUDGE: Overruled, Counsel.

ACTING TRIAL ATTORNEY TO WITNESS:

Q And during the course of your duties, Mr. Bower, had you previously arrested or apprehended illegal aliens who had been employed at Rogers Walla Walla?

A Yes, I have.

Q Could you possibly remember whether this number was numerous number or a few or approximately how many within the past month or two months?

A In the past two months I would approximate sixty illegal aliens were encountered who had been working at Rogers Walla Walla.

Q And would you relate what your procedure was at your arrival at Rogers Walla Walla on the day, I think it was indicated June 23, 1977?

A Some of the officers surrounded the plant to guard the exits on the four sides of the plant. Another and I initially went into the lunch room area and then through to the main part of the plant itself to check for illegal aliens.

Q This was after you had contacted the officials at the plant?

A Yes, it was, and the personnel manager accompanied us inside the plant and showed us where we should go and where we shouldn't.

Q And could you relate how you encountered Mr. Sandoval?

A I can't be absolutely certain about how I encountered any one of the subjects that we encountered at that time. There were so many of them that I can't possibly remember where and which ones I encountered.

Q How many illegal aliens were encountered at Rogers on that particular day?

A I believe the total was 37.

IMMIGRATION JUDGE: Mr. Barr, I wish you wouldn't speak with your client during the course of the hearing. If you want to go off the record, you let me know and you can speak to your client then, but—

COUNSEL: May we go off the record?

IMMIGRATION JUDGE: All right, we will go off the record. Off the record. Back on the record. I would appreciate hereafter if you would wait until after testimony of the witness is taken before you wish to consult with your client, Mr. Barr. Don't break into the witness's testimony. All right, Mr. Bryant, you may continue. Now, I think I missed something there. How many were, approximately, encountered on this last occasion, Mr. Bower? Did you mention that number yet?

WITNESS: Yes. I believe it was approximately 37.

IMMIGRATION JUDGE: And would these have been illegal aliens it was determined?

WITNESS: Yes.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Were these all taken into custody, Mr. Bower?

A Yes, there were all taken into custody at this time. Some were released later.

Q All right. Where were you stationed during this inquiry?

A Initially in the lunch room, as there was a shift change, and that was where a large group of people were at that time and then later during the shift change I was stationed at the main entrance into the plant where all the people would normally go into the plant and come out of the plant.

Q And was there some confusion during that period? Were people running?

A Yes, there was—

COUNSEL: Objection to leading question, your Honor.

WITNESS: There was a lot of confusion.

IMMIGRATION JUDGE: All right, Mr. Bower, you can—I mean, Mr. Bryant, you can rephrase the question.

ACTING TRIAL ATTORNEY TO WITNESS:

Q All right. Mr. Bower, what type of confusion was there?

A Well, when we first entered the lunch room section, many people that were seated got up and started to head for whichever exits were available or just mill around. When we went into the plant area itself, some people started running, left their equipment. Those that were try-

ing to get into the plant were turning around and walking back out.

Q Had you reason to believe that there was no doubt as to who you were or the officers with you?

COUNSEL: Objection, your Honor. He can't testify as to what the persons in the lunch room believed.

ACTING TRIAL ATTORNEY: I think he can. He's an experienced officer.

COUNSEL: Well, however experienced he may be, he's not a mind reader. He hasn't qualified—

IMMIGRATION JUDGE: I will have to sustain that objection. Mr. Bryant. You can bring it out in some other way if you desire to do so.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Had you identified yourself as an Immigration Officer?

A I identified myself as an Immigration Officer and the other officer with me was dressed in Border Patrol uniform.

COUNSEL: Objection. We haven't been told to whom this identification was made. He has indicated—

IMMIGRATION JUDGE: Well, maybe we will get to that, Mr. Barr—

COUNSEL: —he identified himself to the personnel—

IMMIGRATION JUDGE: —maybe he is getting to that. If you want to bring that out later, fine. But maybe he is driving at that.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I believe you said there was a Border Patrol officer there in uniform?

A This is correct.

Q It is a distinctive uniform, it is not, and it indicates—

COUNSEL: Objection, to these leading questions, your Honor.

IMMIGRATION JUDGE: All right. Rephrase it, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q There was an officer there dressed in a Border Patrol uniform, is that correct?

COUNSEL: Objection, your Honor.

IMMIGRATION JUDGE: That is overruled. He can ask that.

A That is correct.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I see. Let's go on to the respondent. Do you have any positive recollections where you had contact with the respondent?

A No positive recollections.

Q Could it possibly have been in the lunch room or in any other part of the plant?

A I would assume, I would just be guessing to tell you the truth, I am not sure where I encountered him in the plant.

Q Did you speak to the respondent?

A I'm personally not sure whether I spoke to him and detained him in the plant or whether it wasn't until afterwards that I spoke with him.

Q You did interview Mr. Sandoval, did you, at that time or later, execute the normal paper work, which is necessary in recording the presence of an illegal alien?

COUNSEL: Objection, your Honor, the question has not indicated when as a point in time. He says, "at that time," We'd have no knowledge of what time he means.

IMMIGRATION JUDGE: Mr. Barr, it seems that we are talking about the day of this apprehension and the day they were in the plant. I would gather that from the information. I am going to overrule your objection. I will let him answer.

COUNSEL: Does the question relate to the plant?

IMMIGRATION JUDGE: I have overruled your objection, Mr. Barr. The witness can answer the question.

WITNESS: Yes, all the aliens that were initially detained in the plant were transported to the Franklin County Jail and processed in the training room of the Pasco Police Department, and that is when I processed him on "Record of Deportable Alien."

IMMIGRATION JUDGE TO WITNESS:

Q Is he sitting in this hearing room, the one you are referring to, Mr. Bower?

A Yes, he is.

Q Will you point him out to me, please.

A He is seated to my right in the blue shirt.

IMMIGRATION JUDGE: All right. Let the record reflect that the witness identifies the respondent.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Did you—

COUNSEL: Would you let the record reflect there is no other persons here, other than the interpreter, the witness, the Trial Attorney, Counsel, and the Judge, and the respondent.

IMMIGRATION JUDGE: I think I asked him if he recognized him.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I will now show you Exhibit No. 3 and ask you if you recognize this form?

A Yes, I do.

Q And did you execute this form?

A Yes, I did.

Q And does it relate to the respondent?

A Yes, it does.

Q And in your questioning of the respondent, did he indicate to you where he was born?

COUNSEL: Objection.

IMMIGRATION JUDGE: The document speaks for itself, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Then, Mr. Bower, this is an accurate recording of your interview with Mr. Sandoval?

A Yes.

IMMIGRATION JUDGE: Anything further, Mr. Bryant?

ACTING TRIAL ATTORNEY: No further questions.

IMMIGRATION JUDGE: All right, Mr. Barr.

COUNSEL TO WITNESS:

Q —was it that you went to the Rogers plant?

A It was ten minutes to three p.m.

Q 2:50 p.m. What is the name of the personnel manager at Rogers?

A Chuck Moreby.

Q You identified yourself to him as an immigration officer?

A Yes. I have had dealings with Mr. Moreby in the past.

IMMIGRATION JUDGE TO WITNESS:

Q In other words, he knew you to be an immigration officer?

A Yes, he did.

COUNSEL TO WITNESS:

Q At what time was it that you set up your check points about the plant and inside it?

A Ten minutes to three.

Q And did you with a loud speaker or loud voice advise all the persons within shouting distance of you that you were Border Patrol and Immigration Officers?

A The Border Patrolman and I, as we entered, as soon as we could be visually seen by the majority of the people in the lunch room, identified ourselves in loud voices as being Immigration Officers.

Q It was at that moment that the confusion arose and people milled about?

A Yes. Well, I will qualify that. They were already starting to mill about. They could see us walking in there.

Q Now, after you entered, did other people continue to enter the plant for the shift change?

A A few people did, yes.

Q And did you—You say you stationed yourselves at the main entrance to the work area of the plant?

A That is correct.

Q And who else was with you there?

A A Border Patrol Agent.

Q Is that Mr. Spence?

A Yes, it is.

Q And how did you handle the procedure as people lined up to enter the plant at that interior entrance?

A We had already arrested two or three aliens and we were looking for a place to detain them, as there was only two of us, and there happened to be a men's rest room and clean up area right at the entrance to the plant. Mr. Spence

stayed at the door there to that and I and he both were at the door to the main entrance to the plant, a swinging door.

Q You and he were both at the main entrance?

A Right.

Q Did one of you go down the line and ask various people questions as they waited to enter?

A We both waited for the lines to file past us. Those that we considered to be illegal aliens, we talked to. Those that we didn't, we didn't talk to.

Q And as you— What— Could you tell us each and every factor that led you to conclude that the respondent here was a person you considered likely to be an illegal alien and, therefore, you interrogated?

A Mr. Spence and my—I can speak for myself for sure—method at that point of time was, most of them were putting their heads down, turning their heads to the sides, avoiding eye contact, trying to get into a tight group of people going through, and my initial questioning of anybody was, "Good day outside?" "Hard work here?" "Do you make lots of money here?" Any kind of questions in English.

Q Were these questions in English or Spanish?

A They were all in English. People that responded in English and answered all the questions in English, I wouldn't continue to talk to. Those that couldn't answer in English, appeared to have a dumb look on their face, didn't know what was going on, and would usually almost start to move towards me as if they had known they were caught and the game was up, at that point I would interrogate them in Spanish as to their right to be and remain in the United States.

Q And what was the question, your initial question in Spanish to those persons?

A Whether they had papers to be in the United States.

Q You spoke in Spanish. What did you use? Just the two words, "Tiene papeles?"

A That would be the initial question, yes.

Q Your practice is, as I take it, not to ask, "Do you have immigration papers?" But just, "Do you have papers?" Is that correct?

A That is correct.

Q Now, you don't remember, I take from what your responses were to Mr. Bryant, when you had contact or whether you had contact with the respondent here inside the plant?

A No. I'm sure Mr. Spence and I were directly responsible for probably 90 or maybe even 95 of the total apprehensions.

Q You divided your work equally, the two of you, there?

A The way the line was filing past, I would get one, he would get one, I'd get two, he'd get one, he'd get two, I'd get one.

Q What is there, about a 50-50 chance then that you handled this respondent?

A I would say, yes, there was about a 50-50 chance.

Q If you had handled him though, wouldn't you remember him at all?

A I have a recollection, but I can't say it was absolutely positive. I could only say what I think, what I believe.

Q This processessing [sic], this is a food processing plant there?

A A potato processing plant.

Q And when the workers go into work, they wear head apparel and face mask or hair mask or something like that for sanitary or Government reasons?

A They were all dressed with a white apron or plastic, so I suppose it would check the food particles or whatever, and a white hard hat-type thing.

Q They had a white hard hat. Did some of them have a gauze mask or something over their face area?

A I don't remember any gauze masks as people were entering or coming out. I saw them when they were inside the plant they had them on, but when they were coming in or out, they didn't have them on.

Q This line that was formed where you were was for people who were going to enter inside and start their shift, right in the actual work area?

A They were coming both ways. There was one line going in and a line of people coming out.

Q Were you checking the line going in or the line going out?

A Both.

Q O. K. I could understand the line coming out not having masks placed, but did the line going in have masks placed that you recall?

A I don't believe— A few of them may have but, as far as I can remember, I don't think most of them. I am almost sure most of them didn't have. They were expecting us to talk to them, I believe.

Q Was the respondent entering work or was this the end of his shift there?

A As I said before, I can't be positive. I think that is an individual who was coming out of the plant and I believe I was the one that initially talked to him. He said he had a wife that was at the plant. I further questioned him as to whether she was a citizen or alien and whether she was here illegally [sic] or not, and at that time he wanted to know where— He wanted to go get his wife. I detained him and told him we would get his wife as soon as we were done checking everybody.

Q Then more probably than not you were the person who effected this respondent's arrest there at the plant?

A I think it is very probable but I can't be absolutely positive.

IMMIGRATION JUDGE: All right, Transcriber, I am going to turn the cassette. All right, Transcriber, this is Side No. 2.

COUNSEL TO WITNESS:

Q Mr. Bower, did you have a warrant for the arrest of this respondent at the time you went to Rogers plant?

A No, I did not.

Q Did you have a warrant for the arrest of any other individual respondent when you went to the plant?

A No, I did not.

Q Did you have an area search warrant for the plant?

A No, I did not.

Q Did you have a specific search warrant for the plant?

A No, I did not.

Q When you spoke with Chuck Morely, did you ask him whether he had authority for the plant to consent to your search?

A He also checked with his superiors and he gave me consent to check the plant.

Q Did he affirmatively represent to you that he had authority for the company to consent to your search?

IMMIGRATION JUDGE: Well, I think he said he went to his superiors.

WITNESS: Yes, he did, and we have had a conference with him in the past with his superior and the plant manager at that time and they said they would not require a search warrant in order to check their plant.

COUNSEL TO WITNESS:

Q At any time?

A At any time. They requested that we give them some advance notice was all.

Q How much advance notice was given in this instance?

A In this instance it was approximately thirty minutes advance notice given.

Q Now, all of these people that you and Mr. Spence detained there were put into this rest room-wash area, all the men were?

A All the men were, yes.

Q And then this respondent would have been placed in there, too?

A Yes, he was.

Q Were they free to leave there?

A No, they were not.

Q Did you recall this respondent's having tried to walk away?

IMMIGRATION JUDGE: When?

COUNSEL TO WITNESS:

Q At any time after you entered the plant?

A If he was the subject I think is that told me about his wife being there and everything, when he was coming out of the plant, he turned around and walked away from me. I had to go to him to talk to him.

Q That is if he were the person who was leaving his shift at that time?

A That is correct.

Q If he were entering at first, it wouldn't be the same person, would it?

A No.

Q If he were entering the shift and you encountered him in the line waiting to go inside the work area, then he would have just been waiting and not attempting to leave in any way, wouldn't he?

A He would have been attempting to enter the plant to go on past me.

Q Would you consider that waiting to pass by you and enter on to his work duty station to be an effort to flee?

A No.

Q O. K. Do you recall whether this particular person had his head down when you interrogated, when you decided to interrogate him?

A Only if he was the subject that I described earlier as trying to come out of the plant that had the wife. He was very evasive. I cannot say if he was one of them entering the plant.

Q If he was not that person that you are thinking of, then you have no recollection of his waiting in line with his head down or head to the side or avoiding eye contact?

A Not him personally. We have established before whenever we are going to search a large number of people like these that we will have probable cause and what are some good instances of probable cause in order to talk to these people.

Q Your sole criteria other than these head and eye movements was whether they spoke English or not?

IMMIGRATION JUDGE: I don't think the witness said that those were his sole criteria. There might be others, Many, many more. There might be haircuts. There might be particular type of mustache a person would have. Might be the clothing they wear. I think those just—

COUNSEL: Your Honor, I am trying to develop exactly that if you would permit me.

IMMIGRATION JUDGE: But I think we are just going after, you are fishing, Counsel. I have let you go on here for an hour practically.

COUNSEL: I assume we are on the record.

IMMIGRATION JUDGE: We are on the record, yes.

COUNSEL: Thank you. May I be permitted to continue?

IMMIGRATION JUDGE: You may be permitted to continue, yes.

COUNSEL TO WITNESS:

Q Would you answer the question?

A Would you repeat the question, please.

Q Was the sole factor other than the heads down, heads to side, avoiding eye contact, that you used in deciding to make the inquiry of the people, whether they spoke English or not in response to your questions?

A After establishing some reason to talk to them at all, why after I go through a few English questions, that to me is enough, if they can't understand or answer.

Q But if they do—

IMMIGRATION JUDGE: All right. I think the answer is—

COUNSEL TO WITNESS:

Q But if they do answer in English—

IMMIGRATION JUDGE: Mr. Barr, let's get the record straight.

IMMIGRATION JUDGE TO WITNESS:

Q What is sufficient to you, Mr. Bower? How do you figure out any requirements that would raise a suspicion in your mind, other than they can't speak English?

A When it comes to the point where I firmly believe that they are an illegal alien. It is something each officer develops, some sooner than some others.

Q Name a few items that you consider.

A Well, there is all kinds of items, depending on the circumstances where you encounter somebody. In this instance, where everybody was in a close, confined area, as people were entering, the eye contact, the evasive movements, trying to be bunched up in groups, being right next to somebody, or trying to walk in parallel with somebody to avoid being spoken to, were all—

Q Those elements that you considered, right?

A Yes.

COUNSEL TO WITNESS:

Q You specifically do not recall any of those items with reference to this respondent unless it turns out, after his testimony, that he was the person who was leaving his shift at that time?

A That is correct. I made sure on each one, each person we talked to, we established probable cause to talk to them.

Q And what factors made it— Why did you believe that he should have been detained then, since you didn't have a warrant for him?

A We just initially detained because of the large number of people coming in and out of there. I initially detain them to question them further. Some people immediately said they had United States citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant, or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q That is your complete rationale?

A Yes.

Q A large number of people, temporary detention, in order to investigate further at your convenience?

A A lot of them were talked to further there and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one presented a document of some kind or another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning.

Q How were these people who were detained there at the plant then transported to the Pasco Jail?

A They were transported in vans and cars.

Q Official vehicles?

A Yes.

Q How many officers then were at the police station when you began processing them?

A Oh, I can't remember for sure, ten or eleven.

Q And at that time you had 37, approximately, people that you were processing?

A That is correct.

Q And all of these ten or eleven assisted in the examination process?

A Very first process was, we had a bus waiting there to go to Mexico immediately and we asked for volunteers of who would like to leave then and there, separated a number to fill out the bus that were—

Q Approximately how many?

A I believe it was thirteen. Then after that, we processed those thirteen first, and the others were processed after that.

Q O. K. These approximately 24 people that were left yet were then processed by all of these ten or eleven officers?

A That is correct.

COUNSEL: If we can go off the record for a second, I have to catch up on my notes, your Honor.

IMMIGRATION JUDGE: All right, off the record. All right, on the record.

COUNSEL TO WITNESS:

Q Officer Bower, was there anything at all about respondent's wearing apparel that bespoke an alien to you?

A No. As I said before, they were all dressed with hard hats on and white aprons, white or clear-colored white, off white, aprons.

Q O. K. At the station, is it correct, that this group was advised en masse of its rights under Miranda and rights to counsel and so forth?

A They were advised en masse of the I-274 program where they can be returned voluntarily and not go through a deportation hearing.

Q In the course of that advice were these people told that they didn't have any rights to remain, as part of the explanation of that program?

A I wasn't physically present inside the "sally port," as it is called. I was outside. What I could just hear them asking for volunteers, explaining that we had a bus there, and

it was going to go, and who wanted to go now and who wanted to wait.

Q Then that wasn't an attempt to explain Miranda rights?

A No.

Q Do you know when and if the respondent was? Whether any of the officers, you, or any of the other officers, attempted to give the respondent any advice of the Miranda rights?

A I personally processed the respondent. He watched me process two or three family groups before him. When it was his turn, I asked him verbally first if he wanted to go back voluntarily or if he was interested in a deportation hearing and he indicated he didn't want to go back voluntarily. I then went over the Form I-274 process.

Q Which is that?

A This relates to voluntary departure from the United States.

Q I think we have mistracked here. My question is when did you advise respondent of his Miranda rights?

A In the Form I-274 it tells him about his right to counsel, etc.

Q Is this a Spanish language form?

A Yes, it is. It is Spanish-English.

Q And does it contain a place for a person to sign, acknowledging that the rights have been read to him and later on acknowledging that he is waiving those rights?

A It is not a form of Miranda rights, Miranda warning rights.

Q There is another form for that purpose, isn't there?

A Yes, there is.

Q What is the number of that form?

A 214.

Q A 214. Did you have Forms 214 with you?

A I am sure we probably did, in our processing.

Q You didn't use one with this respondent?

A No, I didn't.

Q So there is no waiver, no signed waiver of rights, or anything in your record, is there?

A Just my statement on the Form I-213 that he refused voluntary departure and refused to sign I-274.

Q O. K. Now, when— Is the statement of rights on the Form I-274 the same as the statement of rights on the 214?

A No, it is not.

Q What is it? It is an abbreviated form?

A It explains their right to a deportation hearing, right to counsel, and rights along that line, rather than enumerated six or five rights that are normally contained in a Miranda warning.

Q Recalling your processing of the respondent, do you recall that he couldn't read Spanish or English?

A Either he or his wife read to each other or they read it together. I remember them reading it and I believe read part of it together. It was explained more in more laymen's terms what it actually meant after they read it.

Q Did you learn as a result of your processing that he was uneducated?

A I didn't go into his educational background in my processing.

Q Did he at that time indicate that he wanted to talk with me in the language some of my clients use "Abogado Charlie?"

A No, he did not. Neither he nor his wife indicated they wished to communicate with you at that time.

Q Did he ask, say anything at all about wanting to talk to a lawyer?

A I don't believe until I was further through processing he indicated an attorney to represent him or he wanted a chance to be able to talk to an attorney to arrange bond and to be able to try to get his wife out to take care of the baby and at this point—

Q At what point in the processing was that indication made?

A I believe after I processed both him and his wife and told them what the next procedure would be and what the bond would probably be and this kind of stage, after they had declined a 274. I was explaining more of the 274 program to them and they were asking what the alternatives

were. That is when they requested to speak with you, I believe.

Q At the time that you were processing him, were there other officers that would have been available to have undertaken his processing?

A Yes. There was other officers. I took all of the family-type groups off in one corner of the room and was working on them. Most of the family groups, I won't say all.

Q You ascertained that respondent had a newly born child in Pasco. Is that correct?

A That is correct.

IMMIGRATION JUDGE: What does this have to do with the—

COUNSEL TO WITNESS:

Q You went out to the house?

IMMIGRATION JUDGE: —the part about the arrest, Counsel, he having a new child, a newly born child? What is that got to do with this part?

COUNSEL: Just wanted to establish whether he had or not ascertained that in his processing.

IMMIGRATION JUDGE: Well, go to something else, because that has nothing to do with what we are concerned with at this time.

COUNSEL: I would like to see the I-213—

IMMIGRATION JUDGE: You can bring that out later if you desire to do so.

COUNSEL: —your Honor.

IMMIGRATION JUDGE: All right.

COUNSEL TO WITNESS:

Q At the time that the Order to Show Cause was served on the respondent, had the original been signed personally by the District Director, Joseph M. Swing?

A No, it had not. We don't sign the original. That is up for the District Director to sign, or the authorizing officer to sign. We sign the copies occasionally in his name and put our initials down that it has been authorized.

Q That is what was done in this case?

A That is what was done in this case.

IMMIGRATION JUDGE: I note that the 213 shows that—

COUNSEL: Objection, your Honor. The 213 speaks for itself you indicated.

IMMIGRATION JUDGE: All right. I thought it was sort of— Well, I won't go into it.

COUNSEL: That is all the questions I have.

IMMIGRATION JUDGE: Mr. Bryant, anything further of this witness.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL: Your Honor, I would at this point move to suppress the I-213 and to terminate the proceedings on the grounds that the Department's own regulations require that the officer who makes the initial arrest is not to be the officer who examines the arrested person for their I-213 purposes but rather some other officer, and that the only exception to that is where there is no other officer available or would cause unnecessary delay. Mr. Bower's testimony has been quite clear here that there were a number of officers available to process and that there was in fact other officers available to do it at the time that Mr. Bower did process this particular respondent.

IMMIGRATION JUDGE: All right, Based on this record, your motion is denied, Counsel.

COUNSEL: I would further renew the motion to suppress the I-213 on the basis that there was no Form I-214 executed and that forms were available for that purpose and that there is no showing by the Government and there is a presumption against the Government on this matter. There is no showing that there was a knowing, intelligent, and voluntary waiver of his Miranda rights.

IMMIGRATION JUDGE: It is denied, Counsel. I think you are making the record as it doesn't stand. There was no exact statement that they had I-214s. He said, "They probably did." That doesn't mean that they had them on every case. Objection overruled.

COUNSEL: I'm not sure what stage in the proceedings we are at here.

IMMIGRATION JUDGE: Well, I am not suppressing the document.

COUNSEL: O. K.

IMMIGRATION JUDGE: And do you have anything further on the issue of deportability?

COUNSEL: Has the Government rested?

IMMIGRATION JUDGE: On the issue of deportability, yes.

COUNSEL: O.K. I would call the respondent.

IMMIGRATION JUDGE: All right. You may question the respondent.

COUNSEL TO RESPONDENT (through official interpreter):

Q Elias, do you know how to read?

A (not recorded)

Q Have you ever attended school?

A Sometime.

Q Did you finish one year of school?

A No.

Q Do you understand anything at all about your rights as a person in the United States?

A No.

Q When you were in the police station in Pasco, were you advised that you had a right to remain silent?

A (not recorded)

IMMIGRATION JUDGE: Again, please.

A No.

COUNSEL TO RESPONDENT (through official interpreter):

Q Were you advised that anything you might say could and would be used against you in a subsequent proceeding, such as this?

A No.

Q Did your wife attempt to explain to you what your rights were from a piece of paper that the Immigration Officer gave her?

A Yes.

Q Was your wife able to explain that to you?

A But I didn't understand which were the fact.

Q Was your response that "We didn't understand," or that "You didn't understand it?"

A (not recorded)

Q Or was it that "We didn't understand it?"

INTERPRETER: "I didn't understand my way when she explained my rights." That is what he intends to mean.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you know whether your wife understood what she was trying to explain to you?

A Oh, no.

Q Before the officer asked you a lot of questions to fill out a form, did you indicate that you would like to speak to an attorney?

A Yes.

Q And did he tell you that you could?

A (unintelligible)

Q And then were you in fact given an opportunity to use a telephone?

A (not recorded)

Q Did you ever have a chance to call me before you got out on bail?

A My wife did.

Q But you never did?

A No, I didn't have the chance.

Q And your wife did after she was released from the jail, is that correct?

A Yes.

Q When you were— Were you put into the bathroom at the Rogers plant the day of your arrest?

A Yes.

Q Were you forcibly put into the bathroom?

A Yes.

Q Did an officer take ahold of your body at any time?

A Yes, he grasped me in the back.

COUNSEL: The back of his pants, did he say?

INTERPRETER: Yes.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did he take hold of you anywhere else on your body?

A (not recorded)

COUNSEL: Let the record show that he indicated his right shoulder.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you understand that at that point you had been detained and were being held in the custody of the Immigration Service?

A Yes, because they locked me up.

Q Were you— What shift were you working at that time?

A Three o'clock.

Q Was this when you left work or began work?

A The time I was beginning to work, I started to work.

Q You were going to work from 3:00 p.m. until 11:30 or so?

A Yes.

Q Were you going into the work area of the plant or coming out of the work area of the plant when the Immigration Officer told you to go into the bathroom?

A I was coming in.

Q Is that coming into the work area or going into the work area?

A Entering the work area.

COUNSEL: Thank you.

COUNSEL TO RESPONDENT (through official interpreter):

Q Were you wearing a helmet, a work helmet, when you were entering?

A Yes.

Q Were you wearing an apron?

A (not recorded)

Q Did you have any face covering at all?

A Yes.

Q Did the Immigration Officer say anything to you in English before telling you to go to the bathroom?

A (not recorded)

Q As you were waiting to enter the work area, did you realize that the Immigration Officers were checking people there?

A No.

Q Did you see this going on?

A No.

Q Did you hear anybody announce that they were Immigration Officers before you were put into the bathroom?

A No.

Q Did you see anybody there in a uniform?

A Yes.

Q Did you think this was an Immigration Officer or a Police Officer?

A Police.

COUNSEL: That is all I have.

IMMIGRATION JUDGE: All right. Mr. Bryant, do you have any questions of this witness, of the respondent?

ACTING TRIAL ATTORNEY: Yes, one question.

ACTING TRIAL ATTORNEY TO RESPONDENT (through official interpreter):

Q Do you recognize Mr. Bower?

IMMIGRATION JUDGE: All right, Transcriber, I am going to change the cassette.

IMMIGRATION JUDGE: —the respondent looked over to the witness, Mr. Bower, and indicated he recognized him. All right, Mr. Bryant.

ACTING TRIAL ATTORNEY TO RESPONDENT (through official interpreter):

Q Did you willingly answer Mr. Bower's questions?

A Yes.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL TO RESPONDENT (through official interpreter):

Q At the time you say you answered Mr. Bower's questions voluntarily, did you know you had a right not to answer those questions?

A Yes.

Q And knowing you had a right to remain silent, knowing you had a right not to answer any questions, you chose to answer each and every one of Mr. Bower's questions?

A Yes.

Q And how did you learn that you had a right to remain silent?

A (not recorded)

Q But the question was how did you—

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q How did you find out?

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you in fact know then that you had a right to not answer any questions?

A I don't understand.

IMMIGRATION JUDGE: All right, Counsel, go to something else.

COUNSEL: Well, it is difficult to go to something else when the client doesn't seem to understand.

IMMIGRATION JUDGE: Well, he said he understood he had the right to remain silent. He said that twice. And then on your further examination of him now he doesn't understand. I don't know, but I think we shouldn't keep pounding at the witness. If he doesn't understand, he doesn't understand.

COUNSEL: Your Honor, I have discussed this case thoroughly with Mr. Sandoval and I am firmly convinced he did not understand—

IMMIGRATION JUDGE: All right. Go to something else, Mr. Barr.

COUNSEL: —therefore I am surprised by this testimony and I think it is only that he is at this point not understanding what is being asked of him.

IMMIGRATION JUDGE: All right. I will let you ask one more question, but I'm not going to let you keep asking question after question after question. Now, ask your question. I'm not going to let you make a—

COUNSEL: If I have got to only ask one, I have got to get it just right.

IMMIGRATION JUDGE: All right, get it just right. We will go off the record while you think about it. All right, back on the record. After a lengthy discussion with the respondent, Mr. Barr, are you ready to proceed?

COUNSEL: Yes, your Honor.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you understand that you did not have to answer Mr. Bower's questions when he asked you the questions there at the jail?

A (unintelligible)

COUNSEL: Thank you. No further questions.

IMMIGRATION JUDGE: Mr. Bryant?

ACTING TRIAL ATTORNEY: No more.

IMMIGRATION JUDGE: All right. Counsel, are you going to apply for voluntary departure in the alternative—

COUNSEL: Yes, your Honor.

IMMIGRATION JUDGE: —because I am going to deny any motion to terminate on this record.

COUNSEL: I would like to argue briefly that motion before—

IMMIGRATION JUDGE: Argue it by brief. Argue it by brief. I have made up my mind I am not going to terminate. If you want to argue it, you can argue it by brief. I am not going to have any argument on this record. All right. You can turn to the issue of voluntary departure now.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, we are now at the stage in these proceedings where we are going to ask the Judge to exercise his discretion in your favor and grant you an opportunity to depart the United States voluntarily. In that connection I have to ask you certain questions.

COUNSEL TO INTERPRETER: Would you translate that for us, please.

INTERPRETER: Yes.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, you are married?

A Yes.

Q And what is your wife's name?

A Ramona Preciado.

Q Do you have a child born in the United States?

A Yes.

Q When was the child born?

IMMIGRATION JUDGE: Strike the question.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you have a child that was born this year in the United States?

A (unintelligible)

Q What is the child's name?

A Ramona.

Q And this is a female child?

A Yes.

Q And where was this child born?

A (unintelligible)

Q What is the approximate age of the child now?

A Three months.

Q Has this child been in good health lately?

A No.

Q Was she in poor health at the time that you were detained by the Immigration Service in Pasco?

A Yes.

Q Do you have an appointment in the next few days to have the child examined by her doctor?

A Yes.

Q Do you have relatives besides your citizen child in the United States with whom you could leave the child to be raised while you return to Mexico?

A No.

Q Do you have, if the Judge grants you the opportunity to leave voluntarily, [d]o you have funds, money, sufficient to pay for your transportation and your wife's transportation and your citizen child's transportation to Mexico?

A \$200.

Q Do you think that would be sufficient to get you back to Mexico?

A Yes.

Q If the Judge grants you this, would you depart within the time specified by the Judge?

A Yes.

Q Could you wind up your affairs and make your arrangements to depart and depart within a period of thirty days?

A Yes.

Q Have you ever been arrested for any crime?

A No.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q Of what country is your wife a citizen?

A Mexico.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, were you detained by the Immigration Service in 1973?

A Yes.

Q And at that time were you permitted to leave voluntarily?

A Yes.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q How long did you stay out?

A I came back in 1976.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, when you were picked up and given that voluntary departure in 1973, did the Immigration Officer tell you that you couldn't return?

A No.

Q Did they tell you that you couldn't return unless you got a "permiso" of a visa to return?

A No.

Q Why did you come back in 1976?

A (no answer)

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q When were you married?

A June 26, 1973, 25th, June 25, 1973.

COUNSEL TO RESPONDENT (through official interpreter):

Q Was in Mexico?

A Yes.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q When your wife entered, did she enter with you?

A Yes.

COUNSEL: That is all we have, your Honor.

IMMIGRATION JUDGE: All right. Mr. Bryant?

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you have a birth certificate for the child, Maria Ramona?

A I have not received it yet.

Q How did you enter the United States the last time?

COUNSEL: That exceeds scope of direct examination.

A I jumped the line.

IMMIGRATION JUDGE: It is a discretionary application. Objection is denied. He has a right to go into—

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q The wife came with you this last time?

A Yes.

Q Do you have any other children?

A Yes.

Q Where is the other child?

A Guadalajara.

Q Did you pay a smuggler to assist you to illegally enter the United States this last time?

A (unintelligible)

Q How many times have you been arrested by the Immigration Service?

A Twice.

Q The one time in 1973 and this last time in June?

A Yes.

Q And what is the doctor's name who is attending your child?

A I don't know what his name is because my wife is the one who takes care.

COUNSEL: It is Dr. Cleve Enriquez (phonetic).

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you know when your wife took the child to see Dr. Enriquez?

A (not recorded)

IMMIGRATION JUDGE: Again, please.

A I don't know.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Has she ever taken the child to see Dr. Enriquez?

A Yes.

Q When?

A I don't know when because I go to work.

Q You are not even sure then that the child has ever been to the doctor?

A I don't know. She is the one who knows.

Q Do you own a car?

A No.

Q Where are you presently living?

IMMIGRATION JUDGE: The answer was "in Kennewick," Transcriber.

A I don't know the address.

COUNSEL TO INTERPRETER: Did he say that "I just moved there, I don't know what the address is?"

A I moved recently and I don't know the address.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you have any money in the bank?

A No.

Q How much is your rent?

A \$198.

Q And are you presently employed?

A Yes.

Q Where?

A Kennewick.

Q Where?

A Is with a man and I don't know what his name is.

Q What type of work do you do?

A Picking apples.

COUNSEL: Thinning.

INTERPRETER: Thinning apples, I am sorry.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q And how long have you been so employed?

A It was barely started.

Q And how much are you being paid?

A \$1.50 an hour.

Q Is your wife employed?

A Yes.

Q Where?

A With the same person.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q Well, if you and your wife are employed, who takes care of the baby?

A We take her to a lady.

Q Who is this lady you take her to?

A I don't know her name.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you pay her for taking care of the child?

A Yes.

Q —what street that lady's home is on?

A Yes.

Q What is it?

A The apartment house where we live.

COUNSEL: Does that help clarify it, Ken?

IMMIGRATION JUDGE: All right, we are going to take a break for lunch. We will reconvene at two o'clock and I will then consider whether I want to give my decision now or wait till later.

IMMIGRATION JUDGE: All right now, after recess for lunch and after I have reviewed my notes, and there are some things I'm not sure of. Therefore, I am going to have it transcribed and enter my decision in due course. Is that understood, Counsel?

COUNSEL: Yes, your Honor. I would like to ask you to reconsider prior motions denied and renew some motions.

IMMIGRATION JUDGE: No. I am not going to reconsider any motions to deny, no. I have made rulings and my decision is the same.

COUNSEL: Well, I'm not sure that I have covered all of the grounds that I wish to adduce in support of those motions.

IMMIGRATION JUDGE: Well, I consider them closed. I am not going to listen to any more motions on your part at this time.

COUNSEL: Leave to make final argument?

IMMIGRATION JUDGE: No. You will argue by brief if you desire to do so.

COUNSEL: Thank you.

IMMIGRATION JUDGE: All right. This hearing is closed.

* * *

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered -1- through -43- are a complete and accurate transcript of the above-described proceedings, except as noted.

/s/____

ARLEAN F. FRAY
Transcriber

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.
ORDER TO SHOW CAUSE, NOTICE OF HEARING,
AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the
Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A22 346 925

In the Matter of Elias SANDOVAL-Sanchez, Respondent.

Franklin County Jail, 311 W. Agate, Apt. D Pasco, Wa.
Address (number street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States near San Ysidro, California on or about June 1976 (date);
4. You were not then inspected by a United States Immigration officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 815 Airport Way South, Seattle, Washington on July 6th, 1977 at 9:00 am, and show cause why

you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: June 24, 1977
2:25 pm

/s/ Joseph M. During
District Director
Seattle, Washington

Form I-221S (4-1-75)Y

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED
AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS
EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION
PROCEEDINGS, THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing, you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

- ☐ Detained in the custody of this Service
- ☒ Released under bond in the amount of \$1,500.00.
- ☐ Released on recognizance.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

(date)

CERTIFICATE OF SERVICE

Served by me at Pasco, Washington on June 24, 1977 at 2:30 p.m.

/s/ Robert J. Keim
(signature and title of employee or officer)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

File No. A22 346 925In the Matter of Elias SANDOVAL-Sanchez

Respondent.

Franklin County Jail, 311 W Agate, Apt. A, Pasco, Wa.
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States at near San Ysidro, California on or about June 1976;
(date)

4. You were not then inspected by a United States
Immigration Officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act,
in that, you entered the United States without inspection

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 815 Airport Way South, Seattle, Washington on July 6th, 1977 at 9:00 a.m. and show cause why you should not be deported from the United States on the charge (s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: June 24, 19772:25 PM

Joseph A. Ring
(signature and title of issuing officer)
District Director
Seattle, Washington
(City and State)

MATTER OF SANDOVAL

In Deportation Proceedings

A-20824162

Decided by Board August 20, 1979

- (1) Exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974).
- (2) The United States Supreme Court has never applied the exclusionary rule to exclude evidence from purely civil proceedings.
- (3) The issue of whether the Fourth Amendment exclusionary rule should apply in deportation proceedings must be resolved upon a pragmatic analysis of the purposes underlying the rule, the efficacy of the rule as applied in deportation proceedings to serve its remedial objectives, the societal costs incurred by the exclusion of reliable and probative evidence from deportation proceedings, and the available alternatives to deter unlawful conduct by immigration officers.
- (4) If an immigration officer violates an individual's Fourth Amendment rights during an investigation, the evidence resulting from the violation will be excluded from any subsequent criminal prosecution.
- (5) The application of the exclusionary rule to deportation proceedings would not offer any significant additional disincentive to misconduct on the part of immigration officers.
- (6) The application of the exclusionary rule to deportation proceedings would result in societal costs, which could be avoided if the more direct and timely alternatives, which presently exist, were utilized to curb misconduct by immigration officers.

- (7) When the remote likelihood that the exclusion of evidence seized in violation of an individual's Fourth Amendment rights would significantly affect the conduct of immigration officers is balanced against the societal costs that could arise from such action and the alternatives available to compel respect for constitutional rights, neither legal nor policy considerations dictate the exclusion of such evidence from deportation proceedings.
- (8) Even assuming that the alien's admissions as reflected on the Form I-213 ("Record of Deportable Alien") arose as a result of an unlawful search of her apartment, the Form I-213 was admissible at the deportation proceeding and established her deportability by clear, convincing and unequivocal evidence.

CHARGE:

Order: Act of 1952—Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)]—Entry without inspection

Lodged: Act of 1952—Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)]—In the United States in violation of law having failed to establish the time, place and manner of entry as required under sec. 291, I&N Act 8 U.S.C. 1361)

ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE:

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Lloyd A. Sherman
Trial Attorney

BY: Milhollan, Chairman; Maniatis and Maguire, Board Members. Concurring Opinion, Board Member Farb. Dissenting in Part and Concurring in Part Opinion, Board Member Appleman

The respondent appeals from a decision of an immigration judge dated September 30, 1975, finding her deportable as charged and ordering her deportation to Mexico. The appeal will be dismissed. We will, however, grant the respondent voluntary departure under section 244(e) of the Act, 8 U.S.C. 1254(e).

The respondent is a married 36-year-old native and citizen of Mexico. She entered the United States in March 1975. She and her husband crossed the border at night and were not inspected by immigration officers. The couple subsequently made their way to New Rochelle, New York.

On August 6, 1975, the respondent was taken into custody by immigration officers, who located her during a search of the building in which she resided. After being taken to a Service office and advised of her rights, she made a statement admitting her alienage and unlawful entry. She also supplied information resulting in the preparation of Form I-213 ("Record of Deportable Alien").

On that same day, an Order to Show Cause was issued charging the respondent with being deportable under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as one who entered the United States without inspection.

The deportation hearing was convened on August 22, 1975, and was conducted in several sessions, the last of which was on September 30, 1975. During these proceedings, an additional charge was lodged, alleging the respondent to also be deportable under section 241(a)(2) as one who was unlawfully in this country because she failed to es-

tablish the date, manner, and place of her entry as required under section 291 of the Act, 8 U.S.C. 1361.

By order dated September 30, 1975, the immigration judge found the respondent deportable as charged based on her statement of August 6, 1975, and on an admission made at the hearing that she was an alien followed by her refusal to answer subsequent questions regarding her entry.

Both below and on appeal, the respondent, through counsel, submits that her statement of August 6, 1975, and the resulting Form I-213, should have been suppressed as the "fruit of the poisonous tree"—it being alleged that the search of her apartment (which resulted in her detention) was in violation of the Fourth Amendment of the United States Constitution. It is also submitted that the respondent's admission of alienage before the immigration judge resulted from improper questioning subsequent to her invocation of her Fifth Amendment privilege against self-incrimination and that the admission, therefore, should not have been considered. The respondent further states that the immigration judge's conduct of the hearing evidenced a lack of impartiality and a denial of the respondent's Fifth Amendment due process right to a fair hearing. Finally, it is argued that the immigration judge improperly denied the respondent the privilege of voluntary departure after he refused to let her testify for the limited purpose of supporting her application for that relief.

As regards the evidence of deportability, we agree that the respondent's admission at the hearing concerning her alienage was elicited from her after she was improperly denied her Fifth Amendment privilege against self-incrimination. We will accordingly disregard the respondent's admission in this regard.¹ See *Tashnizi v. INS*, 585

¹ The record suggests that the immigration judge repeatedly questioned the respondent concerning her alienage and directed her to respond to his questioning because she had not personally and expressly invoked her Fifth Amendment privilege regarding that matter. See *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Lagui v. INS*, 422 F.2d 807 (7 Cir. 1967); *Chavez-Raya v. INS*, 519 F.2d 397 (7 Cir. 1975). Considering the respondent's statement that she did not "like to answer," counsel's explanation that she was in fact invoking the Fifth

F.2d 781 (5 Cir. 1978); *Valeros v. INS*, 387 F.2d 921 (7 Cir. 1967); *Estes v. Potter*, 183 F.2d 865 (5 Cir. 1950), *cert. denied*, 340 U.S. 920 (1951); *Matter of R—*, 4 I&N Dec. 720 (BIA 1952). See also section 275 of the Act, 8 U.S.C. 1325.

In view of this finding, the sole evidence of record regarding deportability is that which the respondent alleges resulted from an unlawful search of her dwelling and which she submits should have been excluded from the proceedings below.

The facts of this case relating to the challenged search were not clearly developed in the 68-page record. Apparently, however, the respondent and her husband shared the third floor of a 3-story house with 2 other men and one of the men's children (some or all of these persons were related). The ground level apartment in the house belonged to the building's "caretaker" and was accessible by its own exterior door. The upper 2 stories were accessible by one outside entrance. This outside door was always kept locked and each of the tenants and the caretaker had a key. An inside stairway led from the second floor to the third floor, where the respondent resided. There was a door leading to the third floor of the house, which was kept closed, but which had no lock. There was no testimony as to whether the exterior of this door reflected that it led to a separate apartment.

According to the testimony of one of the inhabitants of the third floor of the house, at 6:00 a.m. on the morning of August 6, 1975, he received a telephone call warning him that immigration officers were coming. Approximately 15 minutes later he saw immigration officers outside the house. He did not hear the house bell ring or hear a knock, but assumed the caretaker let the officers into the locked

Amendment privilege, and the language barrier arising from a non-English speaking witness testifying through a translator, we are satisfied that the privilege had been invoked as to the question of alienage and that the subsequent directions to respondent to that question were improper. Cf. *U.S. ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (regarding privilege being "fairly brought to the attention of the tribunal which must pass upon it").

building. Shortly thereafter, two immigration officers opened the door to the third floor area of the house, entered partially, knocked after they had stepped inside, and then searched the apartment.² The respondent's witness testified that no consent was given to search. The Service concedes that the investigators had no warrant. The immigration judge did not require either investigator to testify at the hearing.

The respondent and her husband were subsequently taken into custody and transported to a Service office, apparently after admitting their unlawful status. At 2:15 p.m. that same day, after being advised of her rights, the respondent signed an affidavit, admitting her alienage and her illegal entry into this country. It is this statement and the I-213 prepared in conjunction with it that the respondent urges must be excluded from evidence as the product of an illegal search. See *Wong Sun v. United States*, 371 U.S. 471 (1963) (regarding the suppression of verbal statements). Exclusion is argued solely on Fourth Amendment grounds, as the respondent makes no claim on appeal that her statement was either involuntary or otherwise inadmissible.

On these facts, if we assume that evidence unlawfully seized by immigration officers must be excluded from deportation proceedings, we would find that the respondent had come forward with sufficient proof to establish a prima facie case of illegality so as to require the Service either to assume the burden of justifying the manner which it obtained entry to the respondent's apartment or to establish that the connection between the search and the resulting statement and Form I-213 had become sufficiently attenuated to dissipate any "taint." See *Brown v. Illinois*, 422 U.S. 590 (1975); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). See also *United States v. Karathanos*, 531 F.2d 26, 34-35 (2

² On appeal, the respondent states, through counsel (Brief on Appeal, at page 4), that the 2 investigators, "wielding flashlights, burst through the front door of the apartment." Neither the testimony of the respondent's witness nor her own affidavit, however, supports this characterization of the agents' entry.

Cir. 1976), *cert. denied*, 428 U.S. 910 (1976). As that burden was not placed on the Service and as evidence justifying the search is not in evidence, we are faced with the issue of whether the exclusionary rule should be held applicable in deportation proceedings.³

A preliminary question in this regard is whether unlawfully seized evidence has previously been held excludable from deportation proceedings. Two early district court decisions⁴ ordered the exclusion of such evidence and the Supreme Court in *dicta* in *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) stated that "it could be assumed that evidence obtained by the Department [of Labor] through an illegal search and seizure cannot be the basis of a finding in deportation." A leading immigration law treatise states that:

It is undisputed . . . that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of an unlawful search cannot be used.⁵

Thus, one might assume that the issue has long been resolved.

During the initial 55 years following the *Bilokumsky* decision, however, we find no Federal Court decision either holding that evidence obtained through an unlawful search would be inadmissible in deportation proceedings or in fact excluding any such evidence. Moreover, the Board has never specifically reached this issue. Many decisions do exist in

³ By memorandum, dated October 4, 1978, the General Counsel of the Service states that the Service position is that the exclusionary rule is inapplicable in civil deportation proceedings.

⁴ *Ex parte Jackson*, 263 F. 110 (D. Mont. 1920), *appeal dismissed*, *sub nom. Andrews v. Jackson*, 267 F. 1022 (9 Cir. 1920); *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899).

⁵ Gordon and Rosenfield, *Immigration Law and Procedure* (Revised Edition 1977), at 5-31. No case cited in support of this principle, however, includes a holding in this regard or resulted in any exclusion of evidence from a deportation proceeding. *See Klissas v. INS*, 361 F.2d 529 (D.C. Cir. 1966); *United States v. Montes-Hernandez*, 291 F.Supp. 712 (E.D. Cal. 1968); *Roa-Rodriguez v. INS*, 410 F.2d 1206 (10 Cir. 1969).

which the merits of a challenge to a contested search were addressed,⁶ but over the cited period all reported cases were resolved in the Government's favor, thus obviating the need to specifically reach the question now under consideration. This wealth of cases can be read either as assuming the excludability of unlawfully seized evidence or as declining to address that fundamental issue where not essential to do so.⁷ In either case, however, during this 55-year period neither the Board nor any Federal Court either ordered the exclusion of any unlawfully seized evidence or reached the issue of whether such evidence should in fact be excluded from deportation proceedings.

Remarkably, not until 1977 do we find a Circuit Court decision specifically addressing the question. That year, the First Circuit Court of Appeals in *Wong Chung Che v. INS*, 565 F.2d 166 (1 Cir. 1977), held that the product of an unlawful search would be inadmissible in deportation proceedings. That decision, however, was based in large part on what was viewed as the long history of "assumed" inadmissibility rather than on a detailed analysis of the relative merits of excluding such evidence from deportation proceedings. Compare *Smith v. Morris*, 442 F.Supp. 712 (E.D. Pa. 1977), appeal dismissed on other grounds sub nom. *Smith v. INS*, 585 F.2d 600 (3 Cir. 1978) (exclusionary rule not applicable to deportation proceeding in which

⁶ See *Hoonsilapa v. INS*, 575 F.2d 735 (9 Cir. 1978); *Cordon de Ruano v. INS*, 554 F.2d 944 (9 Cir. 1977); *Aguirre v. INS*, 553 F.2d 501 (5 Cir. 1977); *Ho Chong Tsao v. INS*, 538 F.2d 667 (5 Cir. 1976), cert. denied, 430 U.S. 906 (1977); *Vlissidis v. Anadell*, 262 F.2d 298 (7 Cir. 1959); *Matter of Gonzalez*, Interim Decision 2536 (BIA 1976); *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975); *Matter of Scavo*, 14 I&N Dec. 326 (BIA 1973); *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973); *Matter of Wong*, 13 I&N Dec. 820 (1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *Matter of Au, Yim and Lam*, 13 I&N Dec. 294 (BIA 1969); *Matter of Doo*, 13 I&N Dec. 30 (BIA 1968); *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968); *Matter of D—M—*, 6 I&N Dec. 726 (BIA 1955).

⁷ This Board has not previously intended to reach the issue decided today and withdraws from any language which may be read as suggesting otherwise. See also *Lee v. INS*, No. 77-2265 (3 Cir. filed Jan. 4, 1979); *Cuevas-Ortega v. INS*, No. 77-1630 (9 Cir. filed Jan. 2, 1979).

decision did not depend upon proof of specific events, but merely on proof of status).

Accordingly, as the Board has not previously resolved this issue, as we find only one contemporary Federal Court decision in which unlawfully seized evidence is specifically held to be excludable, and as we find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in any detail, we will address the question as one of first impression.

The initial issue is whether relevant Supreme Court precedent mandates the conclusion that all unlawfully obtained evidence be excluded from civil deportation proceedings *without* further inquiry into the necessity, usefulness, and effect of the exclusion of such evidence within the context of immigration law. We find this not to be the case.

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Supreme Court has found that the "need for deterrence and hence the rationale for excluding evidence are strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction on the victim of the search." (Emphasis supplied.) *Calandra* at 338. Thus, in certain criminal proceedings, the Court has assumed the necessity and efficacy of the "drastic measure" of excluding evidence as a means of deterring law enforcement officials from violating Fourth Amendment rights. See *United States v. Janis*, 428 U.S. 433, 459 (1976).

The Supreme Court, however, has "never . . . applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state." *United States v. Janis* at 447.⁶ The Court in *Janis* did reference the "seminal" lower court decisions that had applied the exclusionary rule to civil proceedings involving "intrasovereign" Fourth Amendment vi-

⁶ See *Janis* at 447 n. 17, regarding the exclusion of evidence from 2 proceedings which were in "substance" and "effect" criminal (i.e., proceedings the subject of which were to "penalize for the commission of an offense against the law." *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965)).

olations, but expressly did not consider that situation. *Janis* at 456. In the same decision, the Court also noted without adverse comment that in "some cases the courts have refused to create an exclusionary rule for either intersovereign or intrasovereign violations in proceedings other than strictly criminal prosecutions."⁹ Thus, it is not entirely clear that the Court would extend the exclusionary rule to exclude evidence in any civil proceeding. See *Todd Shipyards Corp. v. Secretary of Labor*, 586 F.2d 683, 689 (9 Cir. 1978) (questioning applicability of rule in OSHA proceedings). We are convinced, however, that if the rule were to be extended to apply in a given civil proceeding, the Court would only do so after balancing the likelihood of deterring misconduct by government officials against the societal costs imposed by rendering unavailable clearly probative and reliable evidence.¹⁰

Although deportation is a drastic measure and at times "the equivalent of banishment or exile,"¹¹ it has consistently been classified as a civil rather than a criminal procedure.¹² For this reason, every court of appeals that has

⁹ *Janis* at 456. We note in this regard that all of the numerous reported cases which have considered the question have held the exclusionary rule inapplicable to probation revocation proceedings. See *United States v. Frederickson*, 581 F.2d 711, 713 (8 Cir. 1978) and the cases cited therein. See also *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2 Cir. 1970) (rule not applied in parole revocation proceedings).

¹⁰ See *Stone v. Powell*, 428 U.S. 465, 488 (1976); *United States v. Janis*, *supra* at 447-460 (1976); *United States v. Calandra*, 414 U.S. 338, 349 (1974).

¹¹ *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

¹² *Wee Woodby v. INS*, 385 U.S. 276, 285 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Ramirez v. INS*, 550 F.2d 560, 563 (9 Cir. 1977); *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9 Cir. 1976), *cert. denied*, 429 U.S. 1044 (1977); *Nai Cheng Chen v. INS*, 537 F.2d 566 (1 Cir. 1976); *Avila-Gallegos v. INS*, 441 F.2d 1245 (5 Cir. 1971), *cert. denied*, 404 U.S. 946 (1971). See also *Abel v. United States*, 362 U.S. 217, 237 (1960):

According to the uniform decisions of this Court, deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, nor the least, restraint upon the

considered the issue has held that the absence of *Miranda* warnings does not render an otherwise voluntary statement inadmissible in a deportation case. See *Navia-Duran v. INS*, 568 F.2d 803, 808 (5 Cir. 1977); *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9 Cir. 1975); *Anila-Gallegos v. INS*, 525 F.2d 666, 667 (2 Cir. 1975); *Chavez-Raya v. INS*, 519 F.2d 397, 399-401 (7 Cir. 1975). Accordingly, we find no clear mandate to extend the Fourth Amendment exclusionary rule to apply in deportation proceedings without a further inquiry into the appropriateness of doing so. Instead, we find that this issue must be resolved only upon a "pragmatic analysis"¹³ of the purposes underlying the exclusionary rule, the efficacy of the rule as applied in deportation proceedings to serve its remedial objectives, the societal costs incurred by the exclusion of reliable and relevant evidence from deportation proceedings, and the available alternatives to deter unlawful conduct by immigration officers.

The Supreme Court has held that the prime, if not sole, purpose of the exclusionary rule is to deter future unlawful police conduct. *United States v. Janis*, *supra* at 446; *United States v. Calandra*, *supra* at 347. It is well-settled that the rule is not calculated to "redress the injury into the privacy of the search victim."¹⁴ and there would appear little support for the view that application of the rule is essential for the purposes of "judicial integrity."¹⁵ Further, the rule's ultimate purpose is not to punish the Government for the wrongful acts of its agents. Thus, at a minimum, it would appear essential to a decision to apply the rule in deportation proceedings that we find that such application

Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed.

¹³ *Stone v. Powell*, *supra* at 488.

¹⁴ *United States v. Calandra*, *supra* at 347.

¹⁵ *Stone v. Powell*, *supra* at 499 (1976) (Burger, C.J., concurring); *United States v. Janis*, *supra* at 457.

would have some meaningful effect on the future conduct or misconduct of immigration officers.¹⁶

We initially note in this regard that immigration officers are charged with investigating both civil and criminal violations of the immigration laws. *See, for example*, sections 242(d) and (e), 252(c), 264(e), 266, and 274-278 of the Act, 8 U.S.C. 1252(d) and (e), 1282(c), 1304(e), 1306, 1324-1328 (criminal violations under Service jurisdiction). The criminal and civil investigations are routinely performed concurrently because an officer who suspects an individual of being unlawfully present in the United States will not ordinarily know in advance whether or not the individual may also have violated a criminal provision of the immigration laws. If an immigration officer violates an alien's rights under the Fourth Amendment during such an investigation, he knows that evidence resulting from that violation will be excluded from any subsequent criminal prosecution. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Karathanos*, *supra*. Thus, if one starts with the premise that the exclusionary rule is an effective tool of deterrence, the question now before us is whether any *additional* significant deterrent effect would be served by ruling that such evidence should also be excluded from the related civil deportation proceeding.

At first appearance, it might seem that the deterrent effect on immigration officers of excluding unlawfully seized evidence from deportation proceedings could still be equated to the presumed effect on law enforcement officials of excluding such evidence from criminal proceedings. In both instances the evidence would be made unavailable in the proceedings that fall within the officers' "zone of primary interest."¹⁷ The fact that deportation proceedings are

¹⁶ We limit our inquiry here to the question relating to the exclusion of evidence unlawfully seized by immigration officers. However, we find significant support in *Janis* for the conclusion that evidence unlawfully seized by federal and state police officers in pursuance of criminal investigations should not be excluded from deportation hearings (collateral, civil proceedings).

¹⁷ *Janis* at 458.

civil in nature, however, creates further distinctions which make this comparison inapposite.

First, although there is no convincing empirical evidence that the exclusionary rule has operated to deter violations of Fourth Amendment rights by law enforcement officials, the Supreme Court has been willing to apply that "drastic measure" in various criminal settings based on its "own assumptions of human nature and the interrelationship of the various components of the law enforcement system." *United States v. Janis*, *supra* at 459. This willingness arises in part because the rationale for excluding evidence is strongest where criminal sanctions can result and because it was searches for evidence of crime to which the Fourth Amendment was primarily directed. In view of the absence of these factors in the civil setting, we are not convinced that the Court would "assume" the efficacy of the exclusionary rule as a meaningful tool of deterrence if applied in deportation proceedings.

Secondly, the civil nature of deportation proceedings creates a clear impact on the rule's potential effectiveness to deter future misconduct by immigration officers, even if it were extended so as to require the exclusion of unlawfully seized evidence in those proceedings. A significant number of deportation cases involve solely the question of a respondent's *present status*, as distinguished from criminal proceedings where the issues generally relate to a defendant's *past actions*. See *Smith v. Morris*, *supra*. In fact, in many deportation cases the sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry. See section 291 of the Act. It is also true, in view of the civil nature of these proceedings, that the "body" or identity of an alien (as distinguished from alienage) is not suppressible as the "fruit of the poisonous tree" even if it is conceded that an illegal arrest, search, or interrogation occurred. See *Hoonsilapa v. INS*, *supra* at 738; *Wong Chung Che v. INS*, *supra* at 168; *Katris v. INS*, 562 F.2d 866, 869 (2 Cir. 1977); *Avila-Gallegos v. INS*, *supra* at 667; *Guzman-Flores v. INS*, 496 F.2d 1245, 1247-48 (7 Cir. 1974);

Huerta-Cabrera v. INS, 466 F.2d 759, 761 n. 5 (7 Cir. 1972); *La Franca v. INS*, 413 F.2d 686, 689 (2 Cir. 1969). Once an alien's identity is learned, the Service can entirely avoid triggering the exclusionary rule in all cases where documents lawfully in the Service's possession evidence unlawful presence.

Accordingly, even if one presumes the existence of an immigration officer who would intentionally elect either to violate or not to violate an individual's Fourth Amendment rights based on whether his wrongful actions could result in evidence available for use in deportation proceedings, it is not clear that the application of the exclusionary rule would significantly impact on that officer's judgment because what is often the most damaging evidence resulting from an illegal search (the alien's "body") cannot be suppressed.¹⁸ Thus, even if the exclusionary rule were applied in deportation proceedings, a presumed unscrupulous immigration officer would not be assured *prior* to his unlawful act that he would not be "rewarded" with damaging evidence which could result in an alien's deportation.¹⁹ This Board is, therefore, not convinced that the adoption of the exclusionary rule in deportation proceedings would offer any significant additional deterrent to misconduct to an immigration officer who would otherwise intentionally choose to violate an individual's Fourth Amendment rights in hopes of assisting in the alien's deportation.²⁰

¹⁸ By this analysis, we of course do not sanction any hypothetical misconduct. It is solely intended to illustrate the limitations of excluding evidence from deportation proceedings as a meaningful deterrent to immigration officers.

¹⁹ Under these circumstances, only where the officer knew *prior* to the search that the individual was one for whom the Service had no records (*e.g.*, an alien who entered without inspection) or that the Service records alone could not result in a finding of deportability, could now even assume that the incentive for misconduct could be affected.

²⁰ See, Austin T. Fragonan, Jr., *Procedural Aspects of Illegal Aspects of Illegal Search and Seizure in Deportation Cases*, San Diego Law Review, Vol. 14, No. 1, Dec. 1976, at pp. 181-182, regarding impact of exclusionary rule as a deterrent to misconduct by immigration officer under present statutory and case law.

Against this somewhat questionable role as a tool of deterrence, one must consider the "societal costs" imposed by application of the rule. It might be presumed that these "costs" would be minimal in view of the fact that since 1899 we can find only two reported cases in which unlawfully seized evidence was in fact excluded from deportation proceedings and only one other case in which the applicability of rule was specifically addressed. Under such circumstances (even if one assumes that the Service may have elected not to issue Orders to Show Cause in some cases for fear that critical evidence might be found inadmissible), the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies.

There are, however, "costs" which arise even when evidence is not ultimately excluded. Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof.²¹ When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The results frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts not sufficiently developed. The ensuing delays and inordinant amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result. This burden on the "system" is certainly not a basis in itself to conclude that such issues are not appropriate in deportation proceedings, but we think this effect is a relevant consideration when balancing competing inter-

²¹ Presently, in the majority of cases, deportability is conceded and the bulk of the hearing concerns applications for various categories of mandatory or discretionary relief from deportation.

ests and one which cannot be characterized as "trivial." See *Franks v. Delaware*, 98 S.Ct. 2674, 2682-2683 (1978). This is particularly true in a proceeding where delay may be the only "defense" available and where problems already exist with the use of dilatory tactics. See, e.g., *Vasquez-Contreras v. INS*, 582 F.2d 334 (5 Cir. 1978); *Der-Rong Chour v. INS*, 578 F.2d 464 (2 Cir. 1978); *Ballenilla-Gonzalez v. INS*, 546 F.2d 515 (2 Cir. 1976), *cert. denied*, 434 U.S. 819 (1976); *Bufalino v. INS*, 473 F.2d 728 (3 Cir. 1973), *cert. denied*, 412 U.S. 928 (1973).

Other "societal costs" would arise in any case where the rule operated to preclude the deportation of an alien whose presence in "this country was not lawful. We do not suggest that the "cost" of an alien's continued unlawful presence is in any way comparable to the "cost" of allowing a criminal to go free; the differences are of kind, rather than degree. A criminal may be given immunity for past conduct, but is never licensed to commit future crimes. However, where an alien whose status is not lawful is saved from deportation through the operation of the exclusionary rule, the result would be a sanctioning of a continuing violation of this country's immigration laws.

As a final consideration in this regard, we think it possible that the availability of the exclusionary rule in deportation proceedings would make it less likely that aliens and their counsel would pursue more direct and timely approaches to curbing violations of Fourth Amendment rights by immigration officers. It is not unreasonable to assume that an alien will be primarily concerned with his or her own status, and only secondarily concerned with the future actions of immigration officers. Thus, even though the suppression of evidence may be the most cumbersome and unproven tool of deterrence, it is the approach most likely to be pursued by an alien whose Fourth Amendment rights have been violated because of its "windfall" effect.

This last consideration is relevant only if other alternatives exist with respect to curbing such misconduct by immigration officers, but we find that alternatives are available. The most direct initial action that one can take when there is misconduct by an immigration officer is a formal

complaint to his or her superior; in most instances relating to unlawful searches, the District Director. *See* 8 C.F.R. 100.2 *See also* Operations Instruction 287.10, March 15, 1978 ("The Service Professional Integrity Program"). There is no evidence suggesting that the Service is not responsive to complaints regarding employee misconduct. Such an approach provides no "windfall" to the alien, and offers significant advantages over the exclusionary rule in preventing subsequent misconduct. First, the action is direct and timely. It can follow immediately after the alleged misconduct and the complaint can be directed to the official responsible for supervising the day-to-day actions of the officer or officers in question. This approach does not rely on any presumption (which we think unfounded) that the officer will tailor his or her conduct based on an administrative or judicial decision that may come months or even years after the contested action, particularly when it is in no way clear that officers are even aware of the ultimate disposition of the cases in which there are involved. Moreover, this approach has the benefit of forcing supervisory personnel to confront the issues and to clarify policies relating to searches and seizures. Where misconduct is determined to have occurred, the impact on the responsible officer can be significant, direct, and incapable of being ignored (*e.g.*, a fine, suspension, or dismissal). Equally as important, where improper actions are taken by an officer in good faith, education and training can be substituted for punishment.

We note in this regard that we are not dealing with a diverse group of law enforcement agencies responsible to various federal or state authorities. We are concerned with one federal agency and its officers, who are responsible to one agency Commissioner, and in turn ultimately responsible to the Attorney General of the United States. We are not satisfied—and have not been shown—that misconduct by service officers relating to violations of individuals' Fourth Amendment rights cannot be adequately addressed within this forum.

Secondly, where the violations stem from unlawful Service policies rather than from individual misconduct, such

policies regarding searches can be challenged in the Federal Courts by injunctive or mandamus actions—actions specifically designed to deter future misdeeds, rather than to punish for past conduct. See *Loya v. INS*, 583 F.2d 1110 (9 Cir. 1978); *LaDuke v. Castillo*, 455 F.Supp. 209 (E.D. Wash. 1978); *Marques v. Kiley*, 436 F.Supp. 100 (S.D.N.Y. 1977); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7 Cir. 1976), *modified en banc*, 548 F.2d 715 (7 Cir. 1977). These actions also directly impact on the perceived problem, rather than relying on any hope that an officer's conduct will be affected by the result of a subsequent proceeding in which he is neither a party nor (if we presume malevolence) much concerned.²²

Finally, civil or criminal actions against the individual officer may be available. See *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). See also *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2 Cir. 1970); 18 U.S.C. 2234-2236.

We recognize the fundamental right of all persons in this country to privacy free from unreasonable state intrusion. We are sensitive to the fact that many persons journey to this country—at times at great personal sacrifice—in order to live in a society in which constitutional guarantees are meaningfully enforced. We simply are not convinced, however, that the exclusion of unlawfully seized evidence from deportation proceedings would in fact affect the conduct of any immigration officer who would otherwise malevolently violate individual rights.

Accordingly, when we balance what we consider to be the remote likelihood that the exclusion of unlawfully seized evidence from deportation proceedings would significantly affect the conduct of immigration officers with the societal costs that could result from such action and the alternatives available to compel respect for constitutional rights, we are not satisfied that either legal or policy considerations dictate the exclusion of unlawfully seized evidence from these

²² *United States v. Janis*, 428 U.S. at 448 n. 20.

proceedings.²³ In view of the foregoing, we find that the respondent's statement of August 6, 1975, and the Form I-213 were admissible in the proceedings below and that deportability under section 241(a)(2) of the Act was established by clear, convincing and unequivocal evidence.

Regarding the claim that the immigration judge was biased, disrespectful, and incompetent, we find that the respondent's contentions are not supported in the record. We do not agree that alleged errors in rulings and that which counsel perceives as "silly procedural technicalities" indicate either prejudice or incompetence requiring new proceedings before a different immigration judge. The record is at times confused and also suggestive of a strained relationship between the immigration judge and the respondent's three counsel (particularly on the part of counsel), but we find no manifestation of any "bias" on the part of the immigration judge as regards the respondent nor any impermissible restraint on counsel's representation of their client. We note that the immigration judge made various rulings in the respondent's favor, in fact elicited from the Service the fact that no warrant had been used for the search in question, granted frequent recesses to the respondent to confer with her attorneys, accommodated every rescheduling request made by the respondent's counsel, and ultimately adjourned the proceedings and withheld his decision pending submission by the respondent's counsel of a brief in support of their motion. Our review of the record does not reveal "flagrantly injudicious conduct" (as submitted by counsel) resulting in a denial to the respondent of a fundamentally fair hearing.²⁴

²³ Our decision in this regard, of course, does not affect the inadmissibility of evidence obtained in violation of a respondent's privilege against self-incrimination or of statements or admissions that are involuntary or coerced. See *Tashnizi v. INS*, *supra*; *Valeros v. INS*, *supra*; *Navia-Duran v. INS*, 568 F.2d 803 (1 Cir. 1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9 Cir. 1960).

²⁴ It is submitted that the immigration judge was abusive and "shouted" during the proceedings; however, in response to a complaint in this regard he advised counsel that he was not raising his voice, but that it was his normal voice level and he wanted counsel to keep his "voice up." The record in fact reflects that on numerous occasions the

Finally, the respondent challenges the denial of voluntary departure. We are satisfied that she should, as a matter of discretion, be granted that privilege. The parties at the hearing appear to have been unclear as to the meaning of the regulatory language in 8 C.F.R. 242.17(d). In *Matter of Bulos*, 15 I&N Dec. 645 (BIA 1976), decided after the immigration judge's decision appealed from herein, we clarified that the testimony given in support of an application for voluntary departure may not be relied upon to base a finding of deportability. Considering that there appears little doubt as to the respondent's good moral character and in view of the understandable uncertainty at the hearing as to the advisability of answering all questions, we will grant to the respondent the privilege of voluntary departure.

The appeal will accordingly be sustained as to the denial of voluntary departure, and dismissed in all other regards.

ORDER: The appeal is dismissed, except as regards the denial of voluntary departure.

FURTHER ORDER: The outstanding order of deportation is withdrawn, and in lieu of an order of deportation the respondent is allowed to depart voluntarily, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director and under such conditions as he may direct. In the event of the respondent's failure so to depart, the order of deportation will be reinstated.

immigration judge found it necessary to instruct the parties, including the Service's witness, to speak louder. It is also submitted on appeal that the immigration judge engaged in an improper *ex parte* conference with the trial attorney, a Service witness and the Chief Special Inquiry Officer. The record indicates, however, that at the September 9, 1975, hearing the respondent's counsel stated only that it "appeared" to her that a conversation had occurred (the substance of which she did not know) during the course of the previous hearing when she and the respondent were conferring outside the hearing room. The immigration judge indicated that no conversation regarding the proceedings had occurred and, on this record, we find neither material error nor a need to pursue the matter.

CONCURRING OPINION: Ralph Farb, Board Member

The exclusionary rule is not applicable to deportation hearings, nor should it be.

Decision writers and commentators who assume its applicability have failed to discuss it deeply. It is as if it was casually assumed that, because the Fifth Amendment's self-incrimination clause applies and is operative to bar the use of involuntary statements, the same result must follow from violation of the search and seizure clause of the nearby Fourth Amendment. That the two are not analogous is easily demonstrated.

The very words of the Fifth Amendment, prohibiting the use of enforced self-incriminating statements in criminal trials, underlie the extension of the bar to civil and administrative proceedings where the Government is the adverse party. Moreover, such statements are suspect as to reliability and probative value.

By contrast, the Fourth Amendment in itself says nothing about use of illegally seized evidence. The exclusionary rule is not a personal constitutional right of an aggrieved party, it has never been interpreted as applying to all types of proceedings and it is not intended to give redress to the aggrieved party.

The deportation hearing process has never been linked to formal rules of evidence. Evidence which would be inadmissible in a courtroom may be received; if it is probative it may be relied upon to establish a fact. This is consonant with the overall approach to this type of administrative decision making. Neither illegality in the arrest nor irregularity in the contents of the initiating document necessarily stands in the way of a deportability.

For Fiscal Year 1977, the Immigration and Naturalization Service reported that it had located 1,042,000 deportable aliens. Of these, 939,000, or 90%, were listed as having entered without inspection. That means that for the vast majority there was no reason to expect that the Immigration and Naturalization Service records contained prior evidence of their identity as aliens. I am not condoning or encouraging violation of Fourth Amendment rights in the immigration investigator's search for solid

proof of identity. If it were done deliberately, discharge from Government service would be appropriate. I simply don't see how we can reasonably bar the use of illegally obtained convincing proof that a person is an alien with no right of presence, when that may be all that will ever be available to identify him. It would be inconsistent with the manifest intention of Congress that the Immigration and Naturalization Service know the location of every alien in the country.

The Board's decision attempts to draw a distinction between immigration investigators and other types of law enforcement officers as to the hypothetical deterrent effect which might result from the imposition of the exclusionary rule on deportation hearings. I will have none of it. There is no reliable evidence of the effect of the exclusionary rule on conduct of police officers generally, and it is merely fanciful to make comparisons based on the supposed deliberate conduct of knowledgeable officers. Most violations of civil rights result either from ignorance or from excess of zeal. The calculating, unscrupulous officer belongs to fiction, not reality. Despite my reservation in this one regard I agree with the decision.

DISSENTING IN PART AND CONCURRING IN PART: Irving A. Applemen, Board Member

Interim Decision #2725

I concur only in the result reached in this case by the majority decision, not in its rationale. My divergence with my colleagues is threefold: (1) Even assuming an unlawful arrest, the Service evidence in this case is admissible and alienage and deportability have been established by clear and convincing evidence, without any necessity for reaching the issue of applicability of the exclusionary rule; (2) Assuming any necessity for examining the arrest, the evidence respecting the claimed illegality is unsatisfactory in crucial areas, and a reopening of the proceedings is required before the applicability of the Fourth Amendment can be discussed, to determine if an issue actually exists; (3) Assuming *arguendo* the necessity for, and propriety of, reaching the issue, the exclusionary rule is applicable in deportation proceedings.

I

The Government's case rests on a Form I-213 (Record of Deportable Alien), an Affidavit signed by the alien, a Form I-214 (Advice of Rights), and the testimony of Investigator DiPlacidi.

DiPlacidi was responsible for the execution of these documents at the Immigration and Naturalization Service office. He was not the arresting officer. His initial action was to fully advise the respondent of her rights in her own language. The Affidavit (Exhibit 2) was taken from her in Spanish, written down in English and read back to her in Spanish. The Form I-213 (Exhibit 3) was filled out from information partly known to the investigator and partly furnished by the respondent. The Form I-214 is part of Exhibit 2 and notes the time of execution as 2:15 p.m., on the day of the arrest and the place as 20 West Broadway, New York City.¹ The Form I-213 and the affidavit state that the

¹ This is the location of the New York office of the Immigration and Naturalization Service.

respondent is a native and national of Mexico who entered the United States without inspection in March 1975.

The I-213 shows that the alien was apprehended at her residence on August 6, 1975 at 6:30 a.m. during a "field investigation." The *Affidavit* recites that it was taken in Spanish by Investigator DiPlacidi, that he identified himself as an officer of the United States Immigration and Naturalization Service and informed her that he desired to take her sworn statement regarding her illegal entry into the United States. It contains warnings as to her right to remain silent; that anything she said might be used against her in a court or in an immigration or administrative proceeding; that she had the right to talk to a lawyer for advice during questioning; that if she could not afford a lawyer one would be appointed for her; that she had the right to stop answering questions at any time.

According to DiPlacidi, these warnings were given to her in Spanish and she fully understood them. Included in the preliminary warnings, is the statement "I am willing to make a statement without anyone else being present." Her signature appears on both pages. The warnings and statement of rights on the attached I-214 are also in the Spanish language, and are equally complete. The form concludes in substance, "I understand my rights, I am ready to make a declaration and answer questions, for now I do not desire a lawyer. I understand and know what I am doing. I have not been made any promises nor have I been threatened, nor has any pressure or force been used against me." It too bears her signature.

DiPlacidi testified that all information reflected in Exhibits 2 and 3 was freely furnished by the alien. No allegations have been made by the respondent, nor has there been any offer of proof that the information was furnished on other than a completely voluntary basis, without any coercion, duress or intimidation. There appears to have been complete compliance with the Service regulation governing arrest procedures.

Nothing in the evidence offered by the respondent in support of her motion to suppress, indicates that the arrest, even assuming *arguendo* that it was illegal, bore a relation-

ship to the information furnished hours later at the Service office. The allegations in the respondent's affidavit in support of her motion to suppress relate only to the circumstances surrounding the arrest itself. Her supporting witness testified only as to what took place at the time of the arrest. We are being asked, with no evidentiary support whatsoever, to assume that a "taint" carried over *automatically* to these documents, notwithstanding their facial compliance with evidentiary due process requirements (*Trias-Hernandez v. INS*, 528 F.2d 366 (9 Cir. 1975)), the fact that they were executed at a time and place substantially removed from the scene of the arrest, and the buttressing testimony of the Service officer that the information was given freely and voluntarily.

It is appreciated that the bar of the exclusionary rule extends to verbal evidence as much as to other physical evidence. Under the holdings in *Wong Sun v. United States*, 371 U.S. 471 (1963), and *United States v. Karathanos*, 531 F.2d 26, 34-35 (2 Cir. 1976), the taint of an original illegal arrest can carry over to such evidence, and render it inadmissible. Nevertheless, it does not do so in all cases, and in all circumstances. The rule recognizes the possibility of attenuation. Clearly, verbal statements made at the time of an illegal arrest would be inadmissible under *Wong Sun*. At the same time a voluntary confession made several days after the arrest was held admissible in *Wong Sun*, because the connection between arrest and statement had been dissipated. This case falls somewhere in between. *United States v. Karathanos*, *supra*, has an additional element of a government promise to alien witnesses, of voluntary departure without prosecution, which helped to carry the original taint over to their testimony. No such element is present in this case, and *Karathanos* is not determinative on the facts here.

Brown v. Illinois, 422 U.S. 590 (1975), places a burden on the Government to show that a later admission was an act of free will unaffected by initial Fourth Amendment illegality. *Miranda* warnings *by themselves* do not break the causal chain. *Brown*, however, rejects any automatic "but for" rule. Whether a confession is the product of a free will

under *Wong Sun*, *supra*, must be answered on the facts of each case. *Miranda* warnings are an important factor. So too are the temporal proximity of the arrest and confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, *supra*, at 603 and 604.

Measured against these criteria the Service has met its burden. There is un rebutted testimony and evidence as to much more than mere *Miranda* warnings. The warnings themselves were particularly full and complete. There was an intervening lapse of time of about seven hours (as against the less than two hours in *Brown*) between arrest and statement. There is no satisfactory showing of flagrant government misconduct, nor a deliberate Fourth Amendment violation "for investigation" or for "questioning" as was the case in *Brown* (See II—below). None of the evidence relied on was obtained at the time of the arrest.² Above all, there is the testimony of the Service officer respecting the completely voluntary nature of the admissions, to establish their lack of connection with the arrest. Under these circumstances, under the rule in *Wong Sun v. U.S.*, *supra*, the admission cannot be rejected out of hand, as the majority has done.

In summary, the Service has met its burden by a combination of (1) the recitations of the documents themselves, (2) the testimony of the investigator, (3) the lapse of time, and (4) the removal to a different physical location. There is no evidence whatsoever, with respect to Exhibits 1, 2, and 3, even in the form of an offer of proof, let alone any testimony, that the respondent was in any way influenced by the circumstances of the arrest in giving the information in these exhibits. Nothing whatsoever counters the substantial government showing that whatever taint there may have been in the arrest, would have been purged, and the

² In this respect the case differs materially from *Wong Chung Che*, and *Wong Pui Tong v. INS*, 565 F.2d 166(1 Cir. 1977), where the immigration judge had placed heavy reliance on a Crewman's Landing Permit obtained from the alien himself at the scene of the arrest.

causal chain broken. The admissions and exhibits must be taken at their face value.³

Under this view of the case, it is not necessary to reach the applicability of the exclusionary rule. Even assuming a Fourth Amendment violation, the exhibits were admissible and the government has met its burden of establishing alienage and deportability by clear and convincing evidence, *Woodby v. INS*, 385 U.S. 276, 285 (1966). I would concur in a grant of the privilege of voluntary departure, the only relief for which the respondent could be eligible, solely to bring the case, which has been pending far too long, to a conclusion.

II

Assuming, *arguendo*, the necessity of examining the arrest, the second point of divergence is with respect to the majority finding that an illegal arrest has been established. As the majority notes (Dec. page 4) the facts relating to the challenged "search" were not clearly developed. The evidence as to a claimed illegal arrest consists of the respondent's affidavit in support of her motion to suppress (on advice of counsel she stood largely mute throughout the hearing) and the testimony of a witness to the arrest. Taking this evidence in its most favorable light to the respondent, there is a vagueness in crucial details.

At about 6:00 a.m., when the respondent's husband was preparing to go to work, he was alerted by a telephone call that the Service officers were on their way or were in the neighborhood. This was some 15 minutes before the investigators arrived at the apartment building in which the respondent lived with her husband.⁴ We do not know exactly what he was told on the phone, but there is at least a reasonable possibility that the officers were pursuing a specific

³ For what it is worth it will be noted that there is testimony the respondent was not held in custody "after she was brought to the office" (Tr. -23). It raises an intriguing question as to just when custody ceased.

⁴ At the time of the hearing the husband had departed to Mexico (Tr. 42).

lead directly to the respondent or her husband or both. This was not developed by either side, beyond ascertaining that the officers did not have a warrant of arrest. Again, the street entrance to the apartment building, according to testimony, was locked. There is evidence that the officers could not have gained entry into the building unless they secured permission of the caretaker on the first floor, and established in some manner their authority to enter. The record is silent in this area.

The respondent's witness, Jose Sandoval, a nephew of the respondent's husband, testified that the officers entered the apartment, knocked on the wall *after* entering, and identified themselves. Clearly, if the officers knocked *before* entering, this would be inconsistent with the representations of their entering "quickly without permission or consent." Yet, if their actions were as depicted, why would they knock at all? It is unquestioned that there was in fact a knock, raising at least the likelihood that they may have requested and received permission before entering a crucial area of inquiry if the arrest is to be the turning point of the case. The witness at first (Tr. 56) testified that the door to the respondent's apartment was locked when the immigration officers arrived. Subsequently (Tr. 59), he stated it was *not* locked. Again, this is a crucial point of inquiry.

No substantial offer of proof was made, or evidence submitted, of abusive conduct by the Service officers following the arrest. Those present were questioned as to "legal papers." There was no search of the person. The search, such as it was, was "under the beds and the rooms"—apparently for illegal aliens; nothing was taken from the persons or the premises or from the respondent herself. While these points are not determinative of the nature of the arrest itself, they do tend to negate a picture of a coerced and violent entry and search. All of these considerations, coupled with the obvious possibility for misstatement, confusion, or misunderstanding, create substantial doubts whether the respondent's allegations as to a Fourth Amendment violation can be taken at their face value.

The respondent did ask to call the arresting officer to the stand at the outset of the hearing. No objection was inter-

posed by the Service trial attorney, but the request was denied by the immigration judge as premature (Tr. 26). At the time the request was based solely on the affidavit of the respondent in support of her motion to suppress. She herself at no time testified in support of the affidavit nor did she submit herself to examination respecting the circumstances of the arrest or what took place afterwards. Instead she chose to rely on the testimony of Jose Sandoval. (Tr. 40). Following the testimony of Sandoval, both sides rested on the issue of deportability.⁵ The request to subpoena the arresting officer was never renewed, with the result that the record is left in the dubious state in which we now find it.

There was other error below. Either through lack of knowledge of the meaning of 8 C.F.R. 242.17(d), or unwillingness to rely on the somewhat clouded terminology of that regulation, the respondent not only refused to testify with respect to alienage and deportability, but gave very limited testimony in support of her application for discretionary relief of voluntary departure. In this the immigration judge was at least partly to blame in not advising (Tr. 74), that any admissions made in this connection could not be used against her on the issue of deportability. This Board has since clarified the interpretation of the regulation. An alien may testify freely in support of an application for voluntary departure without fear of adverse affect on the case in chief. *Matter of Bulos*, Interim Decision 2486 (BIA 1976). See also *Matter of Lam*, 14 I&N Dec. 168, 173 (BIA 1972); *Matter of Tsang*, 14 I&N Dec. 294, 296 (BIA 1973).

The majority decision has recognized this deficiency in the record and has solved the problem by granting voluntary departure. I would concur in that grant, as a practical matter, for the reasons stated in *I*, above, and to bring the case to a speedy conclusion. However, if the proceeding has to be remanded for other reasons, as is the case if the ex-

⁵ Respondent testified to some extent in support of her application for voluntary departure, although here too, refusing to answer many questions on 5th Amendment grounds.

clusionary rule issue is to be reached because of a possible Fourth Amendment violation, then the question of her eligibility and worthiness for this relief should also be developed fully in reopened proceedings, particularly since Exhibit 2 shows that this is her second entry. In light of *Matter of Bulos, supra*, respondent is now free to testify without restraint.

These inadequacies of the record are significant if this case is to be a tour de force on the legal issue. It has not been satisfactorily shown that the arrest was illegal. At the same time some groundwork has been laid. The majority ruling on the inapplicability of the exclusionary rule is, at the very least, premature. That issue involves a complex consideration of reach and scope of the Fourth Amendment prohibition against unreasonable search and seizure. It can affect countless cases for years to come. Should this case be made the subject of a petition for judicial review, as it gives every indication it may, a court has the right to know if it needs to reach such an issue, or if the case could be disposed of on other, well established and less controversial principles. Accordingly, again assuming the dubious necessity for meeting the issue, the record should be remanded for full development of the circumstances of the arrest, including the testimony of the arresting officer and of the respondent should she elect to testify. If, on remand, a lawful arrest is proved, the issue can then be met with full knowledge of all of the facts, and anaappreciation that it is real rather than hypothesized.⁶

The argument is not convincing that, since the Service has already expressed its view that the exclusionary rule has no applicability in these cases, a remand would serve no useful purpose. The Service has adopted a similar position as to *Miranda* warnings, yet they are in fact required by regulation, appear in Service forms, and are given, even though not judicially mandated. 8 C.F.R. 287.3; *Navia-Duran v. INS*, 568 F.2d 803 (5 Cir. 1977); *Trias-*

⁶ This also would have the indicental benefit of facilitating evaluation of the quality of the Fourth Amendment violation, if any, in accord with the rule in *Brown v. Illinois, supra*.

Hernandez v. INS, 528 F.2d 366 (9 Cir. 1975). Either for purposes of this case, or for clarification of the record in anticipation of a court challenge, or in defense of Immigration and Naturalization Service actions and those of government officers generally, or having in mind possible criminal prosecution in this and in other cases, or for other reasons not known to this Board, the Service might still prefer to amplify this record. More importantly, a remand is required *for the sake of the respondent*.

If the respondent's legal position should be examined on judicial review, it should not meet with a rebuff solely as a result of her not having an opportunity to present significant evidence.

III

Lastly, since this case may well reach the courts in its present posture, it is necessary to state a position on the applicability of the exclusionary rule in deportation proceedings.

It is difficult to quarrel with substantial portions of the majority decision. The applicability of the exclusionary rule in civil proceedings, generally, does appear to be a viable issue. *Weeks v. U.S.*, 232 U.S. 383 (1914); *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *U.S. v. Janis*, 428 U.S. 433 (1976); cf. Concurring Opinion Chairman Roberts, *Matter of Yau*, 14 I&N Dec. 630, 637 (BIA 1974). Concededly too, it has now been established that the deterrent effect of the rule underlies its purpose and usefulness. *U.S. v. Calandra*, 414 U.S. 338 (1974); *United States v. Janis*, *supra*.

Some impatience with the application of the exclusionary rule in deportation proceedings, is also understandable. In case after case, this Board has been confronted with a mute alien and a claim that evidence is tainted by a Fourth Amendment violation and hence should be excluded. Unlike the instant case, frequently no foundation whatsoever has been laid for such a claim. As Board Member Farb noted in his separate concurring opinion, the claims are often advanced in that large body of cases involving claimed recent entrants without inspection, as to whom there usually exist

no Service records and little besides the aliens' own admissions to establish alienage and deportability. In many such cases no affirmative defense to deportability is offered, no offer of proof of improper Service action is advanced, at least in correct or substantial form, and a loud outcry is made for production of the arresting officer, whether his testimony is shown to be necessary or not, presumably so that the respondent may lose himself, the Service, and this Board, in the thickets of obfuscation and delay thus created.

To the extent that this sort of irresponsible challenge is a by-product of holding the exclusionary rule applicable in deportation cases, the majority decision is correct. However, that a challenge may be mounted irresponsibly, in itself does not justify rejection of the rule as a matter of law. Rather, each claim must be met on a case-to-case basis with patience and firmness, and with due regard to the merits of the given case. The exclusionary rule protects the long time lawful permanent resident just as much as the recent entrant without inspection. In any event, it is doubtful that elimination of the exclusionary rule will cure these claims. Challenges to the admissibility of evidence can always be counted on allegations of duress, coercion, and lack of due process. 8 C.F.R. 287.3 bears indigenous seeds for motions to suppress for failure to follow correct arrest procedures. As long as this regulation remains in the books—and the Service, thankfully, has shown no inclination towards removing it—there is always the possibility of a frivolous and purely dilatory challenge to the admissibility of evidence.

However, the majority decision glosses over, much too lightly, one very serious, and perhaps determinative, consideration. It is too late in the game for a change of Service or Board position regarding the applicability of the exclusionary rule. The fact is that the Immigration and Naturalization Service has accepted and applied the rule, as has this Board, for many years and in countless cases since the dictum in *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) that "evidence obtained *** through an illegal search and seizure cannot be made the basis of a finding in

deportation proceedings." As the majority notes, the Board has often pointed to untainted evidence in cases involving this issue, as the basis for its decision, and has refused to rely on evidence which might be flawed by a Fourth Amendment violation. *See, for example, Matter of Cheung*, 13 I&N Dec. 794, 796 (BIA 1971); *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971); *Matter of Hemblen*, 14 I&N Dec. 739 (BIA 1974). The published decisions are replete with discussion of the admissibility of evidence challenged on the ground of illegal arrest and search—discussion which would be surplusage if the Board were not applying and following the exclusionary rule. It is totally irrelevant that the rule has been followed and applied, sometimes expressly, and sometimes by implication. The rule has been followed. There is no question whatsoever that this is the case.⁷

The rule having been accepted and followed for so many years, the natural inquiry is—what reason is there for a change now? The majority decision fails to answer this satisfactorily. The Service has advanced no argument for a change beyond mere reliance on the civil nature of deportation proceedings, and advice that, according to a memorandum of the Associate Attorney General, the Department of Justice is adopting, generally, the rule which the Service is now urging upon us. We, of course, are not bound by the enunciation of position of the Associate Attorney General. *See U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (98 L.Ed. 681, 74 S.Ct. 499).

Despite the strident debate by legal scholars over its efficacy, the exclusionary rule remains the law of the land. To date, nothing in the precedents has limited its application to criminal cases. On the contrary, its application to some

⁷ A partial list of relevant administrative and judicial decisions is set forth in the APPENDIX. As is to be expected, the growth in the sophistication of the challenges is compatible with that of the judicial rulings. While the references to the Fourth Amendment, "tainted evidence," "fruit of the poisoned tree, the exclusionary rule," and formal Motion to Suppress, appear, as such, primarily in the later decisions, the basic underlying challenge to the admissibility of evidence is the same in all of the cited cases, namely, that it was procured by a Fourth Amendment violation.

civil proceedings has been recognized in the federal courts. *See, for example, Pizarello v. U.S.*, 408 F.2d 579 (2 Cir. 1969), *cert. denied*, 396 U.S. 986 (1969)—civil assessment of wagering taxes; *Knoll Associate Inc. v. Federal Trade Commission*, 397 F.2d 530 (7 Cir. 1968)—use of stolen documents by Federal Trade Commission barred in civil action; *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966)—review of plaintiff's discharge from the Air Force; *One 1958 Plymouth Sedan v. Commonwealth of Pa.*, 380 U.S. 693 (1965)—civil proceeding by the state for the forfeiture on an automobile; *Rogers v. U.S.*, 97 F.2d 691 (1 Cir. 1938)—civil action to recover customs duties on imported liquors; *U.S. v. Blank*, 261 F.Supp. 180 (N.D. Ohio 1966)—civil tax assessment; *Lassoff v. Gray*, 207 F.Supp. 843 (W.D. Kentucky 1962)—civil liability for wagering taxes and assessment. *See also U.S. v. Janis, supra*, at 455, 456 and cases there cited. There is also judicial recognition of its use in deportation proceedings, *Ex parte Jackson*, 263 F.110 (DC Mont. 1920), appeal dismissed 267 F.1022 (9 Cir. 1920); *Schenck ex rel Chow Fook Hong v. Ward*, 24 F.Supp. 776 (DC Mass 1938); *Wong Chung Che v. INS*, 565 F.2d 166 (1 Cir. 1977); (and see also court cases cited in APPENDIX).

The rationale of these cases is well expressed in *U.S. v. Blank, supra*, "Where as here there is a correlative civil action open to the Government which imposes a penalty *** commensurate with the criminal sanctions to which as accused, victimized by an illegal search would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum." *Id.*, at 182. While the applicability of the rule in *all* civil proceedings would be highly questionable—and in fact has been rejected, *U.S. v. Frederickson*, 581 F.2d 711 (8 Cir. 1978); *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2 Cir. 1970), absent special considerations it would seem that a nexus to a criminal sanction should reasonably dictate its use. *One 1958 Plymouth Sedan v. Commonwealth of Pa., supra.*

It will be noted that all of the foregoing cases involved *intrasovereign* violations, a careful distinction drawn in *Janis, supra*. Their precedent force, therefore, is in no way impeached by *Janis*, a decision based on the blunting of the deterrent effect of the rule by the lack of interaction between the federal criminal proceeding, and a state civil proceeding. *Janis*, on the other hand, does emphasize the significance of the proximity of the deterred action to the result sought to be achieved.

We are concerned here with one Governmental agency and the enforcement of a statute narrowly restricted to aliens. The evidence supporting the civil deportation case is frequently the same as that which may support a criminal proceeding against the same person. See, for example, Section 275 I&N Act, 8 U.S.C. 1325 (Illegal Entry). The same arresting officer initiates both proceedings and precipitates either or both of the results—*i.e.*, civil or criminal. Even with full awareness of the many cases rejecting, in a civil deportation proceeding, one cannot ignore the severe consequences of deportation in some cases, and its analogy to a criminal sanction (*Fong Haw Tan v. Phelan*, 333 U.S. 6, 10). Despite the circumscription of such rulings as *Almeida-Sanchez v. INS*, 413 U.S. 266 (1973); *Brignoni-Ponce*, 422 U.S. 873 (1975); and *U.S. v. Martinez-Fuerte*, 514 F.2d 308 (9 Cir. 1975), Immigration and Naturalization Service officers have wide latitude to arrest without warrant, both in anticipation of criminal proceedings, and/or as a precursor to the civil deportation proceedings (Section 287, Section 235, I&N Act, 8 U.S.C. 1357 and 1225).

In essence, civil and criminal proceedings walk hand in hand in *intrasovereign* wedlock. We have, therefore, the two requisites for use of the rule in civil proceedings: 1) an *intrasovereign* relationship, and 2) a correlative criminal sanction. Under the majority position, the government may have a criminal action against an alien for violation of section 275 (8 U.S.C. 1325) thrown out because of fatally contaminated evidence, and then turn right around and proceed against him in a deportation proceeding of equal or greater consequence, relying on the identical evidence. This is wrong. *U.S. v. Blank*; *One 1958 Plymouth Sedan v. Commonwealth of Pa.*, *supra*.

Underlying the majority decision is the premise that there is something inherent in a civil deportation proceeding, as against a criminal proceeding, which makes the application of the rule (a) less necessary, and (b) less effective. Neither of these assumptions is acceptable.

There is inconsistency in the majority reasoning that since the exclusionary rule will continue to deter misconduct because criminal proceedings may flow from the deportation "arrest," therefore it is not necessary to apply the rule to the civil proceedings flowing from that arrest. The deportation itself, in some cases, civil or not, is a far more serious consequence than the brief imprisonment or negligible fine customarily meted out for criminal immigration violations, by the courts. If necessary and effective as a deterrent flowing from inability to establish the criminal case, it is at least just as necessary as to the civil one.

The Fourth Amendment guards the right of the "people" to the security of their homes, property and persons. It is not limited in its language either, as to criminal cases or as to citizens.⁸ The exclusionary rule, in turn, links the power to search and seize with the use of incriminatory evidence. Its purpose is to insure that an abuse of one takes the profit out of the acquisition of the other. It prevents the violation by penalizing the violator. Aborting the consequences of a violation is only an incidental result, or better stated, a means to the primary end of curbing Fourth Amendment violations.

So long as an abuse of a power to invade privacy and arrest and search, might be an integral part of the gathering of incriminatory evidence for use in either a civil or criminal proceeding, as is possible in deportation cases, it would seem to make little difference, so far as the violation is con-

⁸ "For the inalienable rights of personal security and safety, orderly and due process of law, are the fundamentals of social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place, or occasion, but belong to man, always, everywhere, and in all circumstance. Every nation demands them for its people from all other nations." *Ex parte Jackson*, 263 F.110, 113.

cerned, if the end result is the use of the evidence in a civil, or criminal, proceeding, or both. If anything, looking to the need for the rule, it would seem to follow that the less significant the objective sought to be obtained by the breach of the constitutional imperative, the more reprehensible and needful of restraint or deterrence, is the violation. Certainly nothing in the inherent nature of a civil deportation proceeding, even assuming it has less "importance" than a criminal case, supports the conclusion the rule is less necessary. Indeed, given the possible lack of education of the alien, frequent language difficulties, and unfamiliarity with either the law or his rights in a strange country, the opposite would seem to be the case.

To evaluate the *effectiveness* of the rule when applied to deportation proceedings, it is necessary to appreciate its rationale. The exclusionary rule is premised on the assumption that the likelihood of aborting a prosecution is a sufficiently significant loss to an officer, to deter him from violations in the future. The majority, in effect then, is saying that the civil deportation proceeding is not sufficiently significant, as compared with criminal proceeding based on the same facts, to bring the deterrent effect of the rule into play.

This too does not withstand examination. On the contrary, if the evidence is barred in the civil deportation proceedings, the consequences are grave enough that the deterrent effect is equivalent to that in a criminal proceeding stemming from the same breach of the law. As for the officer, one possible result of his violation could be, as the majority notes, that the illegal alien may be forever in a non-deportable status. At the very least, new proceedings, wasteful of manpower and money, and uncertain in result, might have to be begun. This should certainly deter a conscientious Service officer from the violation. The conclusion is inevitable that the rationale of the exclusionary rule compels its application to this proceeding.

That there is a paucity of cases terminated because of Fourth Amendment violations, is the soundest proof that the Service has been able to live more than adequately with the rule and that, as the majority noted (Dec. 13), the "soci-

etal costs" of the application of the rule have been minimal. Indeed, if one is to look to consequences (admittedly a questionable basis for decision making), there is probably no better way to facilitate confusion and delay in these cases than through the litigious weapon the majority has now forged. Where hitherto the Board has patiently examined each of these claims of Fourth Amendment violations, their summary rejection as a matter of law, can only spawn repeated, unexamined, un rebutted, and, undoubtedly, lurid, claims of abuse.

In the past the Board has demanded an acceptable nonfrivolous offer of proof as a minimum. *Matter of Geronimo*, 13 I&N Dec. 680 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *U.S. v. Garcia*, 272 F.Supp. 286 (S.D.N.Y. 1967); *Matter of Godfrey*, 13 I&N Dec. 790 (BIA 1971); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971). It has relied only on clearly untainted evidence. If an immigration judge failed in this regard, or misunderstood the position of this Board, the questioned evidence was either given no weight, rejected outright, or the case was returned so that the record might be clarified as to just what had occurred and whether the evidence was tainted or not. See, for example, *Matter of Cheung* and *Matter of Wong*, *supra*. In at least one instance where the Board failed to clearly set forth its reasons for accepting apparently questionable evidence, it was quickly called to account. *Wong Chong Che v. INS*, 565 F.2d 166 (1 Cir. 1977). With this screening, the rule has worked, and the frivolous claim has been sifted out, generally without too much trouble. On the other hand, the occasional nonfrivolous claim, supported by hard facts, has received the attention that it deserves.

In summary, the long standing practice of the Board has been to recognize and apply the exclusionary rule. This has been satisfactory up to this point, due in part to a screening process which weeds out frivolous and irresponsible claims, yet permits scrutiny of substantial challenges. No adequate reason for a change in the Board's position has been put forth. There is judicial support for the use of exclusionary rule in civil proceedings, including deportation proceedings. Precedents dictate its use in civil proceedings involv-

ing (1) an intrasovereign relationship and (2) a correlative criminal proceeding. Deportation is such a proceeding. The reason for the existence of the rule dictates its application here, both in the *need* for the rule and its possible *effectiveness* as a deterrent. Lastly, experience has shown an absence of serious societal costs in the use of the rule in deportation proceedings.

For all of the above reasons I am unable to concur in that portion of the majority decision which holds that the exclusionary rule is inapplicable in civil deportation proceedings.*

Solely for the reasons set forth under Part I of this separate decision, I would find the alien deportable, and would grant voluntary departure within 30 days from the date of this order or such further extension as might be granted by the District Director.

APPENDIX

Matter of B—R—, I&N Dec. 760 (BIA 1952); *Matter of D—M—*, 6I&N Dec. 726, 729 (BIA 1955); *Matter of R—S—*, 71 I & N Dec. 271 (A.G. 1956); *Matter of T—*, 9 I&N Dec. 646, 647 (BIA 1962); *Matter of Pang*; 11 I&N Dec. 213 (BIA 1965), *aff'd sub nom.*; *Ah Chiu Pang v. INS*, 368 F.2d 637 (3 Cir. 1966), *cert. denied*, 386 U.S. 1037; *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968); *Matter of Yam*, 12 I&N Dec. 676 (BIA 1968), *aff'd*, *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877; *Matter of Doo*, 13 I&N Dec. 30 (BIA 1968); *Matter of Methure*, 13 I&N Dec. 522 (BIA 1970); *Matter of Lane*, 13 I&N Dec. 632 (BIA 1970); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974); *Matter of Scavo*, 14 I&N Dec. 326 (BIA 1973); *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *Matter of Au, Yim*,

* There may be alternatives (Dec. P.14ff). They may or may not be effective. Clearly, their existence does not compel rejection of the present remedy. Employee complaints to the Service might seem of questionable effectiveness; and the parameters of *Bevins v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971), and not yet fully known.

and *Lam*, 13 I&N Dec. 294 (BIA 1969); *aff'd*, *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864; *Matter of Burgos and Burgos-Godoy*, Interim Decision 2375 (BIA 1975); *Matter of Chen*, Interim Decision 2440 (BIA 1975), *aff'd* *Nai Cheng Chen v. INS*, 537 F.2d 566 (1 Cir. 1976); *Matter of Rojas*, Interim Decision 2444 (BIA 1975); *Matter of Bulos*, Interim Decision 2486 (BIA 1976); *Matter of Rojas*, Interim Decision 2510 (BIA 1976); *Matter of Davila*, Interim Decision 2521 (BIA 1976); *Matter of Mejia*, Interim Decision 2527 (BIA 1976); *Matter of Gonzalez*, Interim Decision 2536 (BIA 1976); *Matter of Escobar*, Interim Decision 2538 (BIA 1976); *Matter of Castro*, Interim Decision 2547 (BIA 1976); *Matter of Baltazar*, Interim Decision 2556 (BIA 1977) *Matter of Cachiguango and Torres*, Interim Decision 2582 (BIA 1977); *Matter of Taerghodsi*, Interim Decision 2596 (BIA 1977); *Matter of King and Yang*, Interim Decision 2647 (BIA 1978).

See also *Klissas v. INS*, 361 F.2d 529 (D.C. Cir. 1966); *Vlissidis v. Anadell*, 262 F.2d 398 (7 Cir. 1959); *Ho Chong Tsao v. INS*, 538 F.2d 667 (5 Cir. 1976); *Aguirre v. INS*, 553 F.2d 501 (5 Cir. 1977); *Cordon de Ruano v. INS*, 554 F.2d 944 (9 Cir. 1977); *Hoonsilapa v. INS*, 575 F.2d 735 (9 Cir. 1978); *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972); *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8 Cir. 1973); *Huerta-Cabrera v. INS*, 466 F.2d 759 (7 Cir. 1972); *Ojeda-Vinales v. INS*, 523 F.2d 286, 287-288 (2 Cir. 1975); *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7 Cir. 1977); *modifying*, 540 F.2d 1062 (7 Cir. 1976); *Marquez v. Kiley*, 436 F.Supp. 100 (S.D.N.Y. 1977); *Shan Gan Lee v. INS*, 590 F.2d 497 (3 Cir. 1979).

In the Supreme Court of the United States

No. 83-491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER,

v.

ADAN LOPEZ-MENDOZA;

and

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER,

v.

ELIAS SANDOVAL-SANCHEZ

ORDER ALLOWING CERTIORARI. Filed *January 9,*
1984.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.